

01-3093
01-3094

STATE OF WISCONSIN
SUPREME COURT

CASES 01-3093-CR, 01-3094-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

Trial Case Nos. 00 CF 212
(Kenosha County) 00 CF 471

VICTOR NAYDIHOR,
DEFENDANT-APPELLANT-PETITIONER.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND
THE ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION
RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR KENOSHA
COUNTY, THE HONORABLE BRUCE E. SCHROEDER PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT-PETITIONER

BY:

Philip J. Brehm
Attorney For Def.-App.-Petitioner
23 West Milwaukee St., Suite 300
Janesville, WI 53548
608/756-4994
Bar. No. 01001823

TABLE OF CONTENTS

	page
STATEMENT OF ISSUES.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	2
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	4
ARGUMENT.....	8
I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A RESENTENCING WITHOUT CONDUCTING A <u>MACHNER</u> HEARING.....	9
A. <u>The applicable law</u>	9
B. <u>Application of the law to facts of this case</u>	11
II. THE TRIAL COURT ERRED IN INCREASING DEFENDANT'S SENTENCE AFTER DEFENDANT BROUGHT A SUCCESSFUL MOTION FOR RESENTENCING BASED ON A PROSECUTOR'S VIOLATION OF THE PLEA AGREEMENT.....	13
A. <u>North Carolina v. Pearce and State v. Church prohibited the trial court from increasing the defendant's sentence at resentencing in the absence of new, objective information concerning identifiable conduct on the part of defendant occurring after the time of the original sentencing proceedings</u>	14
1. <u>North Carolina v. Pearce</u>	14
2. <u>Wasman v. United States</u>	16
3. <u>State v. Stubbendick</u>	17
4. <u>State v. Church</u>	20
5. <u>Application of law to facts of case</u>	21
a. No new identifiable conduct on the part of defendant was presented during resentencing.....	22
b. No new, objective information was presented to the trial court at resentencing.....	23

B. <u>If the nature and extent of the victim's injuries, including the financial impact, is new, objective information regarding identifiable conduct on the part of defendant justifying an increased sentence on resentencing, then the prosecutor breached the plea agreement by dramatically highlighting this information at resentencing.</u>	26
CONCLUSION.....	27
CERTIFICATION.....	27
INDEX TO APPENDIX.....	28

CASES CITED

<u>Denny v. State</u> , 47 Wis.2d 541, 178 N.W.2d 38 (1970).....	18, 20
<u>North Carolina v. Pearce</u> , 395 U.S. 711 (1969).....	passim
<u>State v. Church</u> , 2003 WI 74, ___ Wis.2d ___, ___ N.W.2d ___.....	14, 20-22, 26
<u>State v. Machner</u> , 92 Wis.2d 797, 285 N.W.2d 905 (Ct.App. 1979).....	13
<u>State v. Smith</u> , 207 Wis.2d 259, 558 N.W.2d 379 (1997).....	13
<u>State v. Stubbendick</u> , 110 Wis.2d 693, 329 N.W.2d 399 (1983).....	14, 17-20
<u>State v. Tarwid</u> , 147 Wis.2d 95, 433 N.W.2d 255 (Ct.App. 1998).....	13
<u>State v. Williams</u> , 2002 WI 1, 249 Wis.2d 492, 637 N.W.2d 733.....	9-11

<u>State v. Woods,</u>	
117 Wis.2d 701,	
345 N.W.2d 457, 465 (1984).....	13
<u>Wasman v. United States,</u>	
468 U.S. 559 (1984).....	16-17, 20

STATE OF WISCONSIN
SUPREME COURT

CASES 01-3093-CR, 01-3094-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

Trial Case Nos. 00 CF 212
(Kenosha County) 00 CF 471

VICTOR NAYDIHOR,
DEFENDANT-APPELLANT-PETITIONER.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND
THE ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION
RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR KENOSHA
COUNTY, THE HONORABLE BRUCE E. SCHROEDER PRESIDING

STATEMENT OF ISSUES

I. WHETHER THE TRIAL COURT ERRED IN DENYING DEFENDANT'S
MOTION FOR A RESENTENCING WITHOUT CONDUCTING A MACHNER
HEARING.

The trial court found defendant was not entitled to a Machner hearing because, in its opinion, the prosecutor did not breach the terms of the plea agreement at resentencing and therefore, trial counsel could not have been ineffective for having failed to object to the prosecutor's argument at resentencing. The court of appeals affirmed the trial court's decision.

II. WHETHER THE TRIAL COURT ERRED IN INCREASING
DEFENDANT'S SENTENCE AFTER DEFENDANT BROUGHT A
SUCCESSFUL MOTION FOR RESENTENCING BASED ON A
PROSECUTOR'S VIOLATION OF THE PLEA AGREEMENT.

The trial court found the increase in defendant's sentence at resentencing was justified under the facts of the case. The court of appeals affirmed the trial court's decision.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As with any case meriting supreme court review, oral argument and publication are appropriate.

STATEMENT OF THE CASE

On 3/7/00, defendant was charged in criminal complaint filed in Kenosha County Circuit Court (00 CF 212) with the commission of three offenses alleged to have occurred on 2/25/00:

1. causing great bodily injury by the intoxicated use of a motor vehicle, a Class D felony;
2. causing bodily injury by the intoxicated use of a motor vehicle, a misdemeanor; and
3. causing bodily injury while operating a motor vehicle with a prohibited blood alcohol content, a misdemeanor (R1-1)¹.

On 3/7/00, the initial appearance was held (R1-3). On 3/15/00, defendant waived his right to a preliminary hearing (R1-8:2-4). On 3/15/00, an information was filed which alleged the same counts as set forth in the criminal complaint (R1-13). Judge Barbara A. Kluka was assigned as trial judge (R1-8:4). On 4/7/00, defendant appeared before Judge Kluka (R1-14). Defendant pleaded guilty to the first count in the information and was found guilty of the offense by the court (R1-14:3-6). The other two counts in the information were

¹There are two records in this single appeal. R1 refers to the record in 00 CF 212, appeal 01-3093-CR. R2 refers to the record in 00 CF 471, appeal 01-3094-CR. R1-1 is the first document in the record for 00 CF 212. R1-1:2 would be the second page of the first document in the record for 00 CF 212.

dismissed (R1-14:2,6). Sentencing was set for 5/18/00 (R1-14:6). On 5/18/00, the State advised the court the defendant had not been compliant with the presentence process and that he was going to be charged with a new count of felony bail jumping (R1-19:4).

On 5/22/00, defendant was charged with a new count of felony bail jumping in Case 00 CF 471 (R2-1). On 5/22/00, the initial appearance was held (R2-3). On 6/7/00, defendant waived his right to a preliminary hearing on the felony bail jumping charge in 00 CF 471 (R2-8:2-4).

On 7/6/00, defendant appeared in court on both matters, represented by Attorney John Moyer (R1-24). Defendant pleaded no contest to the offense of felony bail jumping (R1-24:4). Immediately thereafter, the court proceeded to sentencing in each matter (R1-24:6). The court sentenced defendant to three years initial confinement followed by five years extended supervision on the driving offense and 10 years consecutive probation on the bail jumping offense (R1-24:22-24).

On 7/11/00, defendant filed a Notice of Intent to Seek Postconviction Relief in each case (R1-29, R2-16). On 12/4/00, defendant, represented by Attorney Charles Bennett Vetzner, filed a postconviction motion alleging his sentences should be vacated and a resentencing should be held in front of another judge (R1-32). The motion was not opposed by the State and the relief was ordered by Judge Kluka on 1/9/01 (R1-34:2-3).

On 3/5/01, defendant appeared for resentencing before Judge Bruce E. Schroeder, represented again by Attorney Moyer (R1-39). The court sentenced defendant to prison, this time for five years initial confinement followed by five years extended supervision on the driving offense and 10 years consecutive probation on the bail jumping offense (R1-39:30).

On 3/7/01, a Notice of Intent to Pursue Postconviction Relief was filed by defendant in each file (R1-43, R2-28). On 9/14/01, defendant, by Attorney Philip Brehm, filed a postconviction motion in each file requesting yet another resentencing or in the alternative a vacation of the disposition imposed at resentencing and a reinstatement of the sentence imposed by Judge Kluka (R1-46). On 10/22/01, a postconviction motion hearing was held (R1-47). Although Attorney Moyer was subpoenaed for the hearing, the trial court ruled his testimony was unnecessary (R1-47:28). At the conclusion of the hearing, the trial court denied the motions (R1-47:29, 35). On 11/13/01, an order denying the relief was entered in each file (R1-48, R2-33). On 11/16/01, a Notice of Appeal was filed in each matter (R1-50, R2-35). On 10/30/02, the court of appeals affirmed the decisions of the trial court.

STATEMENT OF THE FACTS

Defendant entered pleas to felony offenses based on the State's promise it would cap its argument at jail time, probation, with conditions, and a fine at sentencing (R1-15:2,

R1-24:2). At defendant's original sentencing, the prosecutor breached its promise to the defendant by undercutting the plea agreement. During sentencing, although the prosecutor advocated for the agreed-upon disposition, he informed the court that at the time the plea agreement was reached, he had not been aware of defendant's criminal and traffic record in Colorado and New Mexico, set forth in the presentence report (R1-22:4, R1-24:7-11).

Defendant requested a vacation of the original dispositions and specific performance by the State at resentencing in front of a different judge based on the State's breach of the plea agreement (R1-32, App. 124-126). The State did not oppose the request, apparently conceding it had breached its promise to the defendant (R1-34:2-3, App. 127).

Resentencing took place on 3/5/01 before Judge Schroeder (R1-39). In his remarks and consistent with the plea agreement, the prosecutor argued for 10 years probation, with one year in jail without work release, community service, and other conditions (R1-39:11-16, App. 128-133). However, the prosecutor again undercut the plea agreement. The prosecutor on two occasions told the court the defendant was a danger to the community (R1-47.1:12, 14, App. 129, 131). The prosecutor highlighted the negative impact the offense had on the victim, as set forth in the victim impact statement:

The victim impact statement makes a couple of interesting points that were not covered in the oral

comments to the Court. Yes, I'm now in a wheelchair and unable to earn a living. I had to get help to do housework and also to help my husband, who is totally blind. I'm behind in all my bills because I have no income. ... (R1-47:12, R1-53, App. 129).

The prosecutor then said:

There is no excuse whatsoever for what happened on February 25th last year. There is no excuse for an otherwise productive citizen of this community to now be confined to a wheelchair, to have bills racking up because of her inability to work and to have her young grandchild in fear when they did nothing wrong and the defendant did everything wrong (R1-47:14, App. 131).

The prosecutor concluded his remarks by dramatically arguing:

And unfortunately, all the restitution in the world is not going to give [the victim] the ability to walk that she had before February 25, 2000 (R1-47:16, App. 133).

In making this specific argument, the prosecutor stressed the victim's physical condition had worsened between the time of the original sentencing and resentencing (R1-24:20-21, R1-39:10).

The trial court responded by sentencing defendant harsher than recommended by either the State or the defense, and harsher than Judge Kluka had at original sentencing (R1-39:23-33, App. 134-141). In resentencing the defendant, Judge Schroeder stated:

And you have ruined this lady's life. And this case, by the way is significantly different than what it was when it was before Judge Kluka because Judge Kluka was working off this presentence, which stated that [the victim] suffered extensive injuries to her leg as a result of this accident, etc.. [The victim] indicated that as a result of the injuries

suffered to her left leg, she may have some permanent disability. Well, now we know that she will. And, in fact, she says she'll never walk again. That's a monstrous increase in the enormity of this crime from how it appeared before Judge Kluka. When Judge Kluka heard this case, it says [the victim] believes her medical expenses total least \$30,000. Now she says it's \$75,000. And she hasn't seen anywhere near the end of it yet (R1-39:25-26, App. 136-37).

At the postconviction motion hearing, the State requested that Judge Schroeder uphold the sentence imposed on resentencing, notwithstanding the fact it was harsher than that contemplated by the plea agreement (R1-47:31-33). At the postconviction motion hearing, Judge Schroeder acknowledged he was aware of the plea agreement between the State and the defense at resentencing (R1-47.1:9, 23-24). He indicated he had reviewed the existing court file in preparation for resentencing and presumably was aware of Judge Kluka's disposition (R1-47.1:15). He indicated he was aware that Judge Kluka's disposition exceeded the terms of the plea agreement (R1-47.1:25). As to the disposition he imposed, and why he felt there was a basis to exceed Judge Kluka's disposition, Judge Schroeder said:

[T]here are new factors here as I pointed out at the time of the sentencing. I do not think that the effect of the victim, if we get away from the effect of the victim on the victim of a crime being an important factor, we're going to have trouble with the population respecting our laws because people rightly insist that the court give due regard to the impact of a crime on a victim in imposing a sentence. ... And in this case the effect produced on the victim, there was every reason to believe that it was very much greater as it appeared to me as it did to Judge Kluka. So I do think a different resentence was appropriate ... (R1-47.1:34-35).

ARGUMENT

Synopsis of defendant's argument

Defendant reached a plea agreement with the State. The State breached the plea agreement at defendant's original sentencing. At his original sentencing, the trial court imposed a sentence structure harsher than advocated by the parties. As he had a right to do, defendant requested a resentencing before another judge. At resentencing, defendant faced the exact same criminal convictions. The State again breached its promise to the defendant by again undercutting the plea agreement. This time, the trial court not only exceeded the recommendations of the parties, but exceeded the sentence imposed at original sentencing. This was done notwithstanding the fact the trial court had not been made aware of any new, negative information about the defendant. This matter should be remanded to the trial court on the issue of whether trial counsel was ineffective for failing to object to the State's argument at resentencing.

In the alternative, this court should vacate the sentences structure imposed by Judge Schroeder because defendant's sentence was impermissible increased after his successful appeal in violation of the law set forth in North Carolina v. Pearce, 395 U.S. 711 (1969). Judge Kluka's sentencing structure should be reinstated.

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A RESENTENCING WITHOUT CONDUCTING A MACHNER HEARING.

Standard of review

Defendant is challenging the trial court's finding the prosecutor did not violate the plea agreement at the time of sentencing. The standard of review is set forth in State v. Williams, 2002 WI 1, ¶20, 249 Wis.2d 492, 637 N.W.2d 733:

We review the circuit court's determination of historical facts, such as the terms of the plea agreement and the State's conduct that allegedly constitutes a breach, under the clearly erroneous standard of review and then determine whether the State's conduct constitutes a substantial and material breach of the plea agreement as a question of law.

A. The applicable law.

The responsibility of a prosecutor to advocate for a plea agreement at sentencing was recently addressed in State v. Williams, 2002 WI 1, 249 Wis.2d 492, 637 N.W.2d 733. In Williams, the defendant was convicted of the felony failure to pay child support. Id. at ¶24. An agreement was struck between the State and defense whereby both parties would recommend 60 days in jail and three years probation. Id. at ¶24. At sentencing, the prosecutor stated the plea agreement at the beginning and end of her remarks to the court. Id. at ¶¶26, 29. However, during the prosecutor's argument to the court, she described the defendant as manipulative and unwilling to take any responsibility for his conduct. Id. at ¶26. She told the court he repeatedly refused to pay child

support or to provide other support for his child. Id. at ¶26. She reminded the court that the presentence writer believed prison was an appropriate disposition. Id. at ¶26. During the prosecutor's argument, defendant's attorney objected to the tenor of the prosecutor's argument. Id. at ¶27. After hearing the remarks of counsel, the trial court sentenced defendant to 18 months prison. Id. at ¶25.

Defendant appealed. On appeal, defendant filed a post-conviction motion for resentencing, arguing the prosecutor had breached the plea agreement. Id. at ¶1. Although the trial court denied the motion, the court of appeals reversed and remanded for resentencing. Id. at ¶1. The Wisconsin supreme court then granted the State's petition for review. Id. at ¶1.

On appeal, the Wisconsin supreme court affirmed the decision of the court of appeals. Id. at ¶59. In reaching its decision, the court discussed the duties of a prosecutor when discussing a plea agreement:

While a prosecutor need not enthusiastically recommend a plea agreement, the court of appeals has stated that he or she "may not render a less than a neutral recitation of the terms of the plea agreement." "End runs" around a plea agreement are prohibited. "The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than recommended. Id. at ¶42.

The State must balance its duty to convey relevant information to the sentencing court against its duty to honor the plea agreement. Thus as the court of appeals has written, the State must walk a "fine line" at a sentencing hearing. A prosecutor may convey information to the sentencing court that is both favorable and unfavorable to the accused, so

long as the State abides by the plea agreement. That line is fine indeed. Id. at ¶44.

We must examine the entire sentencing proceedings to evaluate the prosecutor's remarks. Upon reviewing the State's comments in the context of the sentencing hearing, we conclude, as a matter of law, that the State stepped over the fine line between relaying information to the circuit court on the one hand and undercutting the plea agreement on the other hand. The State substantially and materially breached the plea agreement because it undercut the essence of the plea agreement. Id. at ¶46.

The State did not merely recite the unfavorable facts about the defendant to inform the court fully. Rather, the State covertly implied to the sentencing court that the additional information available from the presentence investigation report and from a conversation with the defendant's ex-wife raised doubts regarding the wisdom of the terms of the plea agreement. The State cannot cast doubt on or distance itself from its own sentence recommendation. Although the State is not barred from using negative information about the defendant that has come to light after the plea agreement and before sentencing, the State may not imply that if the State had known more about the defendant, the State would not have entered into the plea agreement. The State was distancing itself from the recommendation in the present case by implying its reservations about the sentence agreement. Id. at ¶50.

B. Application of the law to facts of this case.

This case is in a posture very similar to that discussed in Williams. The result should be the same. Factually, there is no dispute as to the terms of the plea agreement (R1-8:2, R1-24:2). The issue to be resolved by this court is whether the record demonstrates, as a matter of law, that the State breached the plea agreement at resentencing. The answer is apparent. The State clearly breached the plea agreement at

resentencing in this case. Although the prosecutor stated probation, jail and an a fine was an appropriate disposition, the prosecutor's argument to the court suggested nothing short of a prison sentence was appropriate. The prosecutor did not say one positive word about the defendant during his remarks at resentencing. The prosecutor did not say anything to suggest probation would be an appropriate disposition. In fact the prosecutor's argument suggested the contrary was true; the prosecutor called defendant a danger to the community on two occasions. Although the prosecutor stated he was arguing for probation, he pointed out the defendant had a lengthy history of substance abuse (R1-39:14). He indicated defendant had previously been assessed for substance abuse issues and it had done nothing to curb his behavior (R1-39:14). Even though the trial court had an opportunity to review the victim impact statement, the prosecutor highlighted the victims's substantial injuries and the effect the crime had on the victim, as set forth in the document, and concluded his remarks by dramatically announcing the victim would never walk again (R1-39:12, 16). The prosecutor's presentation was far from a neutral recitation of the facts. The prosecutor breached the plea agreement.

The fact the State breached its agreement with the defendant at resentencing does not end the court's analysis. Trial counsel did not object to the State's improper argument at resentencing (R1-39). If, as a matter of law, the State

breached its agreement with the defendant, trial counsel's failure to object would be deficient performance unless there was some strategic reason for trial counsel's failure to object to the State's improper argument. See State v. Smith, 207 Wis.2d 259, 558 N.W.2d 379, 386 (1997). Although it is difficult to imagine a circumstance when trial counsel would ever have a strategic reason for not objecting to a legally inappropriate argument by the State, case law requires a Machner hearing in this situation. See State v. Machner, 92 Wis.2d 797, 285 N.W.2d 905 (Ct.App. 1979). If, at the Machner hearing, trial counsel is unable to offer a strategic explanation for not objecting to the State's improper argument, prejudice must be presumed, and defendant will be entitled to resentencing under the law set forth in Smith. 558 N.W.2d at 390.

II. THE TRIAL COURT ERRED IN INCREASING DEFENDANT'S SENTENCE AFTER DEFENDANT BROUGHT A SUCCESSFUL MOTION FOR RESENTENCING BASED ON A PROSECUTOR'S VIOLATION OF THE PLEA AGREEMENT.

Standard of review

The standard of review is set forth in State v. Tarwid, 147 Wis.2d 95, 433 N.W.2d 255, 257 (Ct.App. 1998):

Whether [a defendant's] second, harsher sentence violates due process protection presents a question of constitutional fact. We review such questions independently of the trial court's determination. State v. Woods, 117 Wis.2d 701, 715, 345 N.W.2d 457, 465 (1984).

- A. North Carolina v. Pearce and State v. Church prohibited the trial court from increasing the defendant's sentence at resentencing in the absence of new, objective information concerning identifiable conduct on the part of defendant occurring after the time of the original sentencing proceedings.

In support of this argument, defendant relies on the law set forth by the majority opinion of the United States Supreme Court in North Carolina v. Pearce, 395 U.S. 711 (1969). The holding in Pearce has been modified by later cases. However, defendant contends the relevant portion of Pearce, relied upon by defendant in support of this argument, remains good law in the State of Wisconsin, especially considering the Wisconsin Supreme Court's recent decision in State v. Church, 2003 WI 74, which modified State v. Stubbendick, binding precedent on the court of appeals when this case was decided.

1. North Carolina v. Pearce.

The starting point to this analysis is North Carolina v. Pearce, 395 U.S. 711 (1969). In Pearce, defendant was convicted of sexual assault and was sentenced to a term of 12 to 15 years in prison. Defendant successfully appealed his conviction. Defendant was retried, convicted and sentenced. Defendant's ultimate sentence was longer than it would have been had he not appealed. No reason was given by the trial court for the longer sentence on defendant's reconviction. The case was appealed to the United States Supreme Court.

The issue addressed on appeal was the propriety of a trial court imposing a harsher sentence after a successful

appeal and reconviction. In addressing the issue the court said:

We hold, therefore, that neither the double jeopardy provision nor the Equal protection Clause imposes an absolute bar to a more severe sentence upon reconviction. A trial judge is not constitutionally precluded in other words, from imposing a new sentence, whether greater or lesser than the original sentence, in light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." [citation omitted]. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in Williams v. New York, *supra*, that the State may adopt the "prevalent modern philosophy of penology that punishment should fit the offender and not merely the crime. 395 U.S. at 723.

The Pearce court continued:

In order to assure the absence of a [vindictive] motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based on objective information concerning identifiable conduct on the part of defendant occurring after the time of the original sentencing proceedings. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed. Id. at 726.

As the quoted excerpt from Pearce makes clear, the reason for an increase in sentence at resentencing must be based on new, objective information concerning identifiable conduct on the part of defendant occurring after the time of the original sentencing proceedings. (emphasis added). Although the Pearce

holding has been modified by later cases, there has never been a United State Supreme Court case, a Wisconsin Supreme Court case, or Wisconsin Court of Appeals case since Pearce which has upheld a trial court's increase of a defendant's sentence at resentencing based solely on a trial court's perception that the impact of the offense on the victim appeared worse at resentencing than it did at original sentencing.

2. Wasman v. United States.

In Wasman v. United States, 468 U.S. 559 (1984), an issue was addressed regarding the propriety of the trial court increasing the defendant's sentence upon a successful appeal. In Wasman, defendant was convicted of a crime and received a sentence. He successfully appealed and again was convicted of the offense. This time he received a harsher sentence. In support of the harsher sentence, the trial court stated on the record:

"[W]hen I imposed sentence the first time, the only conviction on [petitioner's] record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I did not consider then and I don't in other cases either, pending matters because that would result in a pyramiding of sentences. At this time, he comes before me with two convictions. Last time, he came before me with one conviction." Id. at 562.

On appeal, the defendant argued the trial court was prohibited from increasing his sentence based on the new criminal conviction because the acts constituting the crime were committed prior to defendant's original sentencing. In rejecting this argument, the United States Supreme Court

stated:

We conclude that any language in Pearce suggesting that an intervening conviction for an offense committed prior to the original sentencing may not be considered upon sentencing after retrial, is inconsistent with the Pearce opinion as a whole. There is no logical support for the distinction between "events" and "conduct" of the defendant occurring after the initial sentencing insofar as the kind of information that may be relied upon to show a nonvindictive motive is concerned. This is clear from Williams v. New York, 337 U.S. 241 (1949), which provides that the underlying philosophy of modern sentencing is to take into account the person as well as the crime by considering "information concerning every aspect of a defendant's life". (emphasis added). 468 U.S. at 572.

The Wasman court concluded defendant's intervening criminal conviction, conclusive proof defendant had engaged in criminal activity, was sufficient to support the increase in his sentence. In so holding, the Wasman court reinforced the concept that an increase in a sentence had to be premised on a negative event or negative conduct involving the defendant other than the crime for which the defendant was before the court.

3. State v. Stubbendick.

Between the time of the decisions in Pearce and Wasman, the Wisconsin Supreme Court decided State v. Stubbendick, 110 Wis.2d 693, 329 N.W.2d 399 (1983). In Stubbendick, the court addressed an issue regarding whether a defendant could be sentenced more harshly for an offense following a successful appeal. In Stubbendick, defendant was charged with sexual assault and burglary. He entered into a plea agreement with

the State whereby he pleaded guilty to the sexual assault in exchange for the dismissal of the burglary charge and a joint recommendation for six years prison on the sexual assault conviction. After he was sentenced, defendant successfully brought a motion for a new trial. His conviction was vacated. Both of the original charges were reinstated. Defendant went to trial and was ultimately convicted of both charges. At sentencing, the court imposed concurrent 10 year prison sentences on the convictions. Defendant appealed.

On appeal, the defendant argued that he could not be sentenced more harshly for having exercised his right to appeal. He argued the sentence was in violation of the law set forth in Pearce. In addressing the issue, the Wisconsin Supreme Court discussed the law set forth in Pearce:

This court considered North Carolina v. Pearce in Denny v. State, 47 Wis.2d 541, 544, 178 N.W.2d 38 (1970) and recognized that Pearce contained an ambiguity regarding what constituted a proper objective factor. One portion of Pearce states that the reasons for imposing a harsher sentence must be based on "identifiable conduct ... occurring after the time of the original sentencing proceeding." 395 U.S. at 726, 89 S.Ct. at 2081. Yet another section of the opinion says that a judge may increase the sentence "in the light of events subsequent to the first trial that may have thrown new light upon the defendant's life, health, habits, conduct, and mental and moral propensities." 395 U.S. at 723, 89 S.Ct. at 2079. We adopted Justice White's concurrence to resolve this ambiguity. Justice White stated a trial judge could consider "any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding." 395 U.S. at 751, 89 S.Ct. at 2088 (J. White, concurring in part), quoted in Denny v. State, 47 Wis.2d at 545-46, 178 N.W.2d 38. ... In summary, the Pearce-Denny rule is designed to prevent a trial judge from being vindictive

against a defendant for exercising his rights. The possibility is eliminated since a trial judge can increase a sentence only if new objective factors can justify a more severe sentence. A trial judge is allowed to consider all events occurring subsequent to the first sentence or not known by the court at the time of initial sentencing. Stubbendick, 329 N.W.2d at 402.

Although the holding in Stubbendick appears to be broad and sweeping, in upholding the increase in sentence, the court stated:

Regarding the enhanced sexual assault sentence, there are essentially three newly known objective factors that justify the four year increase. They include: (1) leniency based on a plea agreement is not necessarily applicable at a resentencing after trial; (2) defendant's poor prospects for rehabilitation; and (3) amplified knowledge of the defendant's criminal activity obtained from trial. Id at 403.

Stubbendick court did not reach the specific issue to be addressed by this court. As such, its broad conclusion a trial judge is allowed to consider all events occurring subsequent to the first sentence or not known by the court at the time of initial sentencing in increasing a sentence on resentencing is obiter dictum.

Defendant contends the broader holding advocated by the court in Stubbendick would be violative of the holding of Pearce. The decision in favor of the defendant in Pearce was premised on the defendant's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. 395 U.S. at 725. The Wisconsin Supreme Court is bound by the Pearce holding. The Wisconsin Supreme Court

cannot afford a Wisconsin defendant less protection from vindictiveness at resentencing than that afforded by the United States Supreme Court did in Pearce.

In her dissent, Justice Abrahamson correctly questioned the authority of the majority to dilute the defendant's constitutional protection afforded under Pearce:

To guard against this hazard which is inherent in the resentencing process, the Court requires the trial court to state, on the record, its reason for imposing a harsher sentence. These reasons must meet several criteria: (1) they must be based on objective information; (2) they must concern identifiable conduct; (3) that conduct must be on the part of the defendant; (4) that conduct must occur after the time of the original sentencing proceeding. (Like the majority, I recognize that this fourth factor is ambiguous in light of other language in the Pearce opinion.) The United States Supreme Court has set forth a difficult test which the trial court must pass on the record it creates. I write separately because I disagree with the majority's conclusion that the three reasons for increasing this defendant's sentence which the majority reads into the circuit court's statements at sentencing satisfy the Pearce-Denny criteria. (Abrahamson dissent) 329 N.W.2d at 407.

Stubbendick was decided between Pearce and Wasman. Recently, the Wisconsin Supreme Court decided State v. Church, 2003 WI 74, which reinforces the relevant holding of Pearce and substantially undercuts the relevant dictum of Stubbendick.

4. State v. Church.

In Church, a defendant was convicted of five offenses, four of them sexual in nature. Id. at ¶2. He was sentenced to 13 years in prison and placed on consecutive probation. Id.

Defendant successfully argued one of his convictions was multiplicitous and he was granted a resentencing. Id. at ¶3. Upon resentencing, he was sentenced to 17 years in prison and was placed on consecutive probation. Id. In increasing Church's sentence, the trial court said:

I feel that we are in exactly the same position we were in when Mr. Church sat before me almost four years ago ... The offense remains just as serious, the character of the defendant has not changed in any way, the protection of the public remains a very serious concern. The only thing that has changed is nearly four years have passed and Mr. Church .. [has today] made his first step toward admitting responsibility and seeking help for his very significant problems. I feel those four years have been wasted and that to impose the same sentence today would in effect give Mr. Church credit for spending the last four years without acknowledging his offense and without doing anything to obtain treatment. Id. at ¶15.

The issue in the case was whether there was an adequate basis in the record to justify the increase in sentence. The Wisconsin Supreme Court held that the increased sentence was presumptively vindictive, in violation of Church's right to due process, and that the presumption was not overcome by adequate, objective new factors in the record justifying the increase. Id. at ¶4.

In deciding the issue, the Wisconsin Supreme Court said:

The Pearce presumption of vindictiveness can be overcome if "affirmative reasons" justifying the longer sentence appear in the record and if those reasons are "based on upon objective information" regarding events or "identifiable conduct on the part of the defendant" subsequent to the original sentencing proceeding. Pearce, 395 U.S. at 726. The longer sentence in this case was premised on the passage of time: four years of incarceration had gone by, and Church was still (mostly) in denial

and had not sought or received treatment. This does not constitute "objective information" of identifiable conduct on the part of the defendant" subsequent to the original sentencing. It constitutes a subjective evaluation of the status of Church's rehabilitation at the time of resentencing, based not on any new facts but on the mere continued existence of the original facts." Church at ¶¶56-57.

5. Application of law to facts of case.

If one applies the law to the facts of this case, it is apparent defendant Naydihor's increased sentence cannot be upheld. The set of facts relied upon by the trial court at resentencing to increase defendant's sentence was neither new, "objective information," nor was it "identifiable conduct on the part of the defendant" occurring subsequent to the original sentencing.

- a. No new identifiable conduct on the part of defendant was presented during resentencing.

No serious argument can be made that the information relied upon by Judge Schroeder in increasing defendant's sentence was new "identifiable conduct on the part of the defendant" occurring subsequent to the original sentencing. Not one word was uttered during the resentencing hearing suggesting defendant has misbehaved in any way during the time period between original sentencing and resentencing. The State's focus at resentencing was on the offense itself. For this reason alone, the increased sentence should be vacated.

- b. No new, objective information was presented to the trial court at resentencing.

Judge Schroeder cited two facts as new, objective information supporting a harsher sentence: (1) the increase in medical expenses incurred by the victim; and (2) the nature and extent of the victim's injuries. At resentencing, Judge Schroeder stated:

And you have ruined this lady's life. And this case, by the way is significantly different than what it was when it was before Judge Kluka because Judge Kluka was working off this presentence, which stated that [the victim] suffered extensive injuries to her leg as a result of this accident, etc.. [The victim] indicated that as a result of the injuries suffered to her left leg, she may have some permanent disability. Well, now we know that she will. And, in fact, she says she'll never walk again. That's a monstrous increase in the enormity of this crime from how it appeared before Judge Kluka. When Judge Kluka heard this case, it says [the victim] believes her medical expenses total least \$30,000. Now she says it's \$75,000. And she hasn't seen anywhere near the end of it yet (R1-39:25-26, App. 136-37).

If one carefully analyzes the so-called new, objective information Judge Schroeder relied upon in increasing defendant's sentence, it is apparent the information was not new at all and Judge Kluka had considered this information at the time of original sentencing.

In the victim impact statement filed with the court on 4/20/00, the victim listed her medical expenses at \$22,000 and indicated they were "on going" (R1-53:2). In the presentence report, dated 6/21/00, the expenses were listed at "at least \$30,000" (R1-22:2). The presentence report indicated

additional surgery and therapy would be required to treat her injury (R1-22:2). The presentence report also indicated the victim had suffered severe financial hardship as a result of the accident (R1-22:2). Both these documents were available to Judge Kluka prior to the original sentencing. In rejecting the plea agreement, Judge Kluka considered the serious impact the offense had on the victim in imposing sentence (R1-24:21).

Regarding the nature and extent of the victim's injury, the victim impact statement indicates the victim was confined to a wheel chair as of 4/20/00 (R1-53:4). The presentence report indicated:

[The victim] suffered extensive injuries to her left leg as a result of this accident. At the time of this interview her left leg has been in a cast for 2-1/2 months and it was expected that the cast would remain on for an additional six months. ... [The victim] underwent surgery on 2/26/00 for the injuries incurred to her left leg and she is expected to undergo at lease [sic] one more surgery in the near future. [The victim] indicated that as a result of the injuries suffered to her left leg she may have some permanent disability, but that will not be officially determined until the cast is removed. Once the cast is removed, she will need extensive physical therapy (R1-22:2).

Judge Kluka considered the substantial physical impact of the offense on the victim in imposing the prison sentence (R-24:21).

At resentencing, eight months later, the victim appeared in court and told Judge Schroeder what effect of the crime on her:

I'm confined to a wheelchair. I'll probably be in it forever, okay. They are attempting to build a brace for my leg, but so far they haven't found

anything that's going to help me walk. I can't walk. He has taken away my livelihood. I can't work. Now it's amazing someone wasn't killed because I do remember the accident. And I realize he didn't do it on purpose. Who would do something like that on purpose, you know. But in the meantime look where I'm at. I have an x-ray if you would like to see what my leg looks like. I have had three major surgeries and I'm facing one more. They are very optimistic. (emphasis added). My doctor bills so far have been like \$70,000. That's a lot of money. And I had to pay it. I got some money from my insurance because I carry uninsured motorist. But it's gone. The medical bills took care of that. So I don't know what Mr. Naydihor's future is, but some day when he goes to work, I think he should compensate me somewhat (R1-39:10).

From these remarks, Judge Schroeder concluded there had been a "monstrous increase in the enormity of this crime from how it appeared before Judge Kluka" (R1-39:26).²

In one objectively compares the complement of information made available to Judge Kluka at original sentencing with that made available to Judge Schroeder at resentencing, it is apparent there is little difference between the two sets of information. It is nothing short of semantic gymnastics to suggest "at least \$30,000" in medical bills, with additional surgeries and physical therapy to be required in the future is substantially different that medical bills "like \$70,000," with one more surgery contemplated. Either way, the offense had a substantial, negative financial impact on the victim.

The same is true regarding the nature and extent of the

²In reviewing these comments by Judge Schroeder, it is apparent he used Judge Kluka's sentence as a baseline or minimum. Counsel is unaware of any rule of law which required Judge Schroeder to impose at least the same sentence imposed by Judge Kluka.

victim's injuries. In imposing sentence, Judge Kluka was aware the victim was confined to a wheelchair at sentencing, that she would be confined to a wheelchair for at least six months after sentencing, and that her condition could be permanent. Little if anything had changed at resentencing. At resentencing, the victim did not say she would in fact never walk again. She indicated that her doctors were working on a solution to help her walk and that her doctors were optimistic as to her chances of walking again. There is little support for Judge Schroeder's ultimate conclusion that the victim's overall circumstance had gravely deteriorated. The so-called new, objective information was used by Judge Schroeder to provide justification for an increase in defendant's overall sentence by two actual years in custody. (emphasis added).

B. If the nature and extent of the victim's injuries, including the financial impact, is new, objective information regarding identifiable conduct on the part of defendant justifying an increased sentence on resentencing, then the prosecutor breached the plea agreement by dramatically highlighting this information at resentencing.

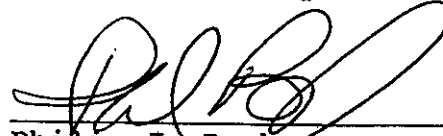
Under Pearce and Church, the increased sentence cannot be upheld under the facts of this case. Even if the increased sentence could somehow upheld notwithstanding these cases, then defendant would then be entitled to relief because the State breached the plea agreement. The increased sentence would be the product of the State improperly arguing facts

coming into being between sentencing and resentencing, implicitly suggesting to the resentencing court that circumstances had changed after the plea agreement was reached between the defense and the State, justifying an upward departure from Judge Kluka's sentencing scheme.

CONCLUSION

For the reasons set forth above, this court should grant defendant a resentencing. In the alternative, this court should vacate the sentence imposed by Judge Schroeder at resentencing. Judge Kluka's sentence structure should be reinstated.

Respectfully submitted this 10th day of October, 2003


Philip J. Brehm
Attorney For Defendant

23 West Milwaukee St., Suite 300
Janesville, WI 53548
608/756-4994
Bar. No. 1001823

CERTIFICATION

I certify this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Courier 12, 10 spaces per inch, non-proportional font, double spaced, 1 1/2 inch margins on the left and one inch margins on the other three sides. This brief is less than 11,000 words in length, 27 pages in length.

Dated: 10/10/03


Philip J. Brehm

INDEX TO APPENDIX

pages

10/30/02 decision of the court of appeals.....	101-115
Excerpt of 7/6/00 transcript: pronouncement of sentence by Judge Kluka.....	116-123
Defendant's Motion for Postconviction Relief, filed 12/4/00.....	124-126
Order granting resentencing.....	127
Excerpt of 3/5/01 transcript: prosecutor's remarks at resentencing.....	128-133
Excerpt of 3/5/01 transcript: pronouncement of sentence by Judge Schroeder.....	134-141

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 2002

**Cornelia G. Clark
Clerk of Court of Appeals**

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal Nos. 01-3093-CR
01-3094-CR**

**Cir. Ct. No. 00-CF-212
00-CF-471**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

VICTOR NAYDIHOR,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Kenosha County: **BRUCE E. SCHROEDER**, Judge. *Affirmed.*

Before **Nettesheim, P.J.**, **Brown** and **Snyder, JJ.**

¶1 **NETTESHEIM, P.J.** Victor Naydihor appeals from judgments of conviction for causing great bodily harm by the intoxicated use of a motor vehicle

and felony bail jumping contrary to WIS. STAT. §§ 940.25(1)(a) and 946.49(1)(b) (1999-2000)¹ and from an order denying his motion for postconviction relief. Naydihor's appeal stems from his resentencing, which was necessitated by improper remarks by the prosecutor in violation of the plea agreement at the original sentencing. The resentencing produced an increased sentence. On appeal, Naydihor argues that his trial counsel was ineffective at the resentencing for failing to object to certain remarks by the prosecutor which Naydihor contends once again breached the plea agreement. Naydihor also contends that the increased sentence was the product of judicial vindictiveness in violation of his due process rights.

¶2 We hold that the prosecutor did not violate the terms of the plea agreement at the resentencing hearing. Therefore, the resentencing court did not err in denying Naydihor's request for a *Machner*² hearing. We further hold that the State properly presented updated information about the victim's current physical and financial condition and that the resentencing court was entitled to consider such information on the resentencing decision. Therefore, the increased sentence was not the product of judicial vindictiveness. We therefore affirm the judgments and order.

BACKGROUND

¶3 On February 25, 2000, Naydihor was involved in an accident with another vehicle causing injuries to its two occupants. The investigation

¹ All statutory references are to the 1999-2000 version unless otherwise indicated.

² *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

determined that Naydihor was at fault and that he was intoxicated at the time of the accident. As a result, the State filed a criminal complaint against Naydihor alleging three counts: (1) causing great bodily harm by intoxicated use of a motor vehicle contrary to WIS. STAT. § 940.25(1)(a); (2) operating while intoxicated causing injury contrary to WIS. STAT. §§ 346.63(2)(a) and 346.65(3m); and (3) operating with a prohibited alcohol concentration (PAC) contrary to WIS. STAT. §§ 346.63(1)(b), 346.65(3m) and 340.01(46m).

¶4 On March 15, 2000, Naydihor waived his right to a preliminary hearing and entered into a plea agreement with the State. Under the agreement, Naydihor would plead guilty to the charge of causing great bodily harm by the intoxicated use of a motor vehicle, and the State would dismiss the remaining charges.³ The State further agreed to recommend a period of probation, but retained the right to recommend any conditions of probation.

¶5 On April 7, 2000, Naydihor appeared before Judge Barbara A. Kluka and entered a guilty plea to causing great bodily harm by the intoxicated use of a motor vehicle. In keeping with the plea agreement, the State dismissed the remaining charges and indicated that it would recommend probation, but retained a "free hand" on the conditions of that probation. After accepting Naydihor's plea, Judge Kluka scheduled sentencing for May 18, 2000, and ordered a presentence investigation. At the scheduled sentencing hearing, the State notified Judge Kluka that Naydihor had not cooperated in completing the presentence investigation and had not complied with the conditions of bond. Judge Kluka then

³ The plea agreement also disposed of various forfeiture citations related to the accident that are not relevant to this appeal.

granted the State's request to revoke Naydihor's bond, and the sentencing hearing was adjourned.

¶6 On May 22, 2000, the State charged Naydihor with felony bail jumping. Naydihor entered a no contest plea to that offense before Judge Kluka on July 6, 2000, and the matter proceeded to sentencing on both offenses—causing great bodily harm by the intoxicated use of a motor vehicle and bail jumping. Consistent with the plea agreement on the great bodily harm charge, the State argued for probation with one year of confinement in the county jail as a condition of probation.⁴ However, the prosecutor further stated that the State had entered into the plea agreement before learning the extent of Naydihor's prior record. Naydihor's counsel argued for probation with or without jail on the driving offense and a fine on the bail jumping offense. Judge Kluka also heard from Naydihor and reviewed a written impact statement from the victim.

¶7 In fashioning the sentence, Judge Kluka noted the victim's injuries, her medical expenses, her confinement to a wheelchair, and her inability to work for six months or to provide the necessary aid to her blind spouse. Judge Kluka ultimately rejected the plea agreement recommendation and sentenced Naydihor to three years' initial confinement followed by five years of extended supervision on the great bodily harm offense and ten years of consecutive probation on the bail jumping offense.

¶8 On December 4, 2000, Naydihor filed a postconviction motion requesting resentencing. In his motion, Naydihor contended that the State had

⁴ The State also asked for a \$2000 fine on the bail jumping conviction.

breached the plea agreement based on the prosecutor's statement that the State had entered into the plea agreement before learning the extent of Naydihor's prior record. At the hearing on the motion, the State did not contest Naydihor's argument, and Judge Kluka granted Naydihor's motion. Judge Kluka further directed that the matter be assigned to a different judge.

¶9 The matter was then assigned to Judge Bruce E. Schroeder who conducted the resentencing on March 5, 2001.⁵ The victim of Naydihor's offense appeared at the hearing and described the changes in her financial and physical condition since the time of her victim impact statement. The victim stated that she continued to be unable to walk or work. She indicated that she is "confined to a wheelchair" and "probably will be in it forever." She noted that her medical expenses had increased to approximately \$70,000 and that the money from her uninsured motorist coverage had not covered her expenses.

¶10 As to the great bodily harm offense, both the State and Naydihor's counsel reiterated the positions they had taken in the original sentencing proceeding before Judge Kluka.⁶ Without objection from Naydihor's counsel, the prosecutor twice referred to Naydihor as a danger to the community and also addressed the worsened physical and financial condition of the victim. Like Judge Kluka, Judge Schroeder declined to follow either party's recommendation. Instead, Judge Schroeder sentenced Naydihor to five years of initial confinement

⁵ Naydihor moved for substitution of Judge Schroeder pursuant to WIS. STAT. § 971.20. That request was denied and Naydihor does not challenge that ruling on appeal.

⁶ As to the bail jumping offense, neither party stated a position.

followed by five years of extended supervision on the great bodily harm offense and ten years of consecutive probation on the bail jumping offense.

¶11 On September 14, 2001, Naydihor filed a postconviction motion requesting a second resentencing or, in the alternative, the vacation of Judge Schroeder's sentence and the reimposition of Judge Kluka's sentence. Naydihor argued that the prosecutor's comments at resentencing had once again breached the plea agreement and that his counsel was ineffective for failing to object to the comments.

¶12 Judge Schroeder denied Naydihor's motion following a hearing on October 22, 2001. The judge determined that the prosecutor had not breached the plea agreement and that there were new factors presented at resentencing regarding the victim's physical and financial condition that warranted an increased sentence. A written order denying Naydihor's motion for postconviction relief was entered on November 13, 2001. Naydihor appeals.

DISCUSSION

Breach of Plea Agreement

¶13 Naydihor first contends that the prosecutor breached the terms of the plea agreement during the resentencing hearing before Judge Schroeder and, therefore, he was entitled to a *Machner* hearing to determine whether his counsel was ineffective for failing to object to the prosecutor's remarks. Judge Schroeder denied the motion without a hearing, ruling that the State had not breached the plea agreement.

¶14 In reviewing a breach of plea agreement case, this court will uphold the circuit court's determination of historical facts—the terms of the plea

agreement and the State's conduct in question—unless they are clearly erroneous. *State v. Williams*, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733. However, whether the State's conduct constitutes a substantial and material breach of the plea agreement presents a question of law. *Id.*

¶15 The plea agreement in this case provided that the State would “recommend probation ... but retain[] a free hand on the conditions of that probation.” Naydihor contends that the prosecutor violated the plea agreement at resentencing by twice informing the court that Naydihor was a danger to the community. Naydihor additionally argues the prosecutor improperly emphasized the impact on the victim by stressing the victim's worsened financial and physical condition since the initial sentencing. Naydihor points to the following statements by the prosecutor:

There is no excuse whatsoever for what happened on February 25th last year. There is no excuse for an otherwise productive citizen of this community to now be confined to a wheelchair, to have bills racking up because of her inability to work and to have her young grandchild in fear when they did nothing wrong and the defendant did everything wrong....

And, unfortunately, all the restitution in the world is not going to give [the victim] the ability to walk that she had before February 25, 2000.

¶16 Whether trial counsel was ineffective for failing to object to the prosecutor's remarks turns on whether the remarks violated the plea agreement. A prosecutor's statements constitute an actionable breach when the breach is material and substantial. *See id.* at ¶38. A material and substantial breach is one that defeats the benefit for which the accused bargained. *Id.* While a prosecutor need not enthusiastically recommend a plea agreement, he or she may not perform

an “end run” around a plea agreement by covertly conveying to the trial court that a more severe sentence is warranted than that recommended. *Id.* at ¶42.

¶17 Here, the prosecutor agreed to recommend probation, but retained a “free hand” as to the conditions of probation, a caveat that is critical to the resolution of the issue. The prosecutor argued for maximum jail time without work release followed by a lengthy period of probation. In support of that request, the prosecutor could reasonably and fairly argue that Naydihor’s driving conduct, which had caused serious and disabling injuries to the victim, represented a danger to the community. These statements dovetailed with the prosecutor’s further discussion of Naydihor’s “polysubstance abuse” and failure to pass substance tests when he was out on bond. As a result, the prosecutor requested that the conditions of probation also require Naydihor to obtain chemical dependency assessments, complete treatment programs, and submit to weekly random urine tests.

¶18 Naydihor relies on the supreme court’s decision in *Williams* in support of his contention that the prosecutor’s remarks at his resentencing constituted a material and substantial breach of his plea agreement. However, Naydihor’s reliance is misplaced. Both the plea agreement and the prosecutor’s comments in this case are readily distinguished from the agreement and comments in *Williams*.

¶19 In *Williams*, the State promised to recommend a sentence of three years’ probation with sixty days in the county jail. *Id.* at ¶24. However, at sentencing the State provided a less than neutral recitation of the plea agreement and implied that had it known more about the defendant, it would not have entered into the plea agreement. *Id.* at ¶47. In addition, the prosecutor declared her personal negative opinion of the defendant, creating the impression that the State

was backing away from the plea agreement. *Id.* at ¶48. The prosecutor in this case made no such indications.

¶20 Further, unlike the prosecutor in *Williams*, the prosecutor in this case did not reference the lengthier sentence recommendation in the presentence investigation report, much less imply that he agreed with it. Further, the prosecutor did not discuss imprisonment or incarceration during his statements to the court. Rather, consistent with the recommendation, the prosecutor stressed that Naydihor needed to be supervised and “monitored.”

¶21 We conclude that the prosecutor’s recitation of the State’s recommendation was fairly and properly targeted at the State’s request for maximum confinement as a condition of probation. Therefore, the statements were not a breach of the plea agreement, much less a material and substantial breach of the agreement. Although Judge Schroeder chose not to follow the State’s recommendation, Naydihor nevertheless received the benefit of the agreement for which he bargained.

Vindictiveness of the Increased Sentence

¶22 Judge Kluka had originally sentenced Naydihor to a three-year term of initial confinement, followed by five years of extended supervision. At resentencing, Judge Schroeder increased Naydihor’s initial term of confinement by two years for a total of five years of initial confinement, followed by five years of extended supervision. Naydihor argues that this increased sentence was vindictive and in violation of his constitutional right to due process.

¶23 While sentencing lies within the sound discretion of the trial court, whether an increased sentence on resentencing violates due process presents a

question of law which we review de novo. *State v. Church*, 2002 WI App 212, ¶16, ___ Wis. 2d ___, 650 N.W.2d 873.

¶24 Naydihor relies on *North Carolina v. Pearce*, 395 U.S. 711 (1969), in support of his contention that the increased sentence imposed by Judge Schroeder violates his constitutional rights. In *Pearce*, the Supreme Court recognized the power of a resentencing court to impose a greater sentence than the one imposed initially. *Id.* at 723; see also *State v. Helm*, 2002 WI App 154, ___ Wis. 2d ___, 647 N.W.2d 405. However, the *Pearce* Court stressed that vindictiveness on the part of the sentencing court may not play a part in the resentencing after a new trial, and the defendant must not be placed in fear of such retaliatory motivations on the part of the sentencing judge. *Pearce*, 395 U.S. at 725. To protect a defendant against potential vindictiveness, the *Pearce* Court held that an increase in the sentence must be supported by reasons set forth on the record and must be “based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.” *Id.* at 726 (emphasis added).

¶25 Naydihor relies on *Pearce* in arguing that his increased sentence is impermissible because it is based not on his conduct, but on information relating to the impact of his crime on the victim. We reject Naydihor’s contention that *Pearce* limited the trial court’s ability at resentencing to consider factors other than his conduct.

¶26 *Pearce* involved a resentencing following a retrial. This court recently addressed the application of *Pearce* to a resentencing that did not occur after a retrial. *Church*, 2002 WI App 212 at ¶¶17-20. We determined that in such a case, we apply the broader rule set forth in *State v. Leonard*, 39 Wis. 2d 461,

473, 159 N.W.2d 577 (1968), a case decided one year prior to *Pearce*, which applies not only to resentencings after retrial but to any resentencing. *Church*, 2002 WI App 212 at ¶19.

¶27 The *Leonard* rule provides:

[O]n resentencing following a second conviction after retrial, or mere resentencing, the trial court shall be barred from imposing an increased sentence unless (1) events occur or come to the sentencing court's attention subsequent to the first imposition of sentence which warrant an increased penalty; and (2) the court affirmatively states its grounds in the record for increasing the sentence.

Leonard, 39 Wis. 2d at 473. We observe that there is no indication in *Leonard* that a trial court's consideration is limited to the defendant's conduct. Rather, we read *Leonard* to permit a resentencing court to consider *any* relevant information that developed, or events that have occurred, after the original sentence.

¶28 Our reading of *Leonard* is consistent with the *Church* court's discussion of the broad language in *State v. Carter*, 208 Wis. 2d 142, 560 N.W.2d 256 (1997). In *Church*, we concluded that *Carter* requires:

[T]he trial court should consider all relevant information at resentencing, including all information unknown to the court at the time of the original sentencing and information about events and circumstances occurring after the original sentencing.... [T]he role of the trial court is the same at a resentencing as at the original sentencing: the court is to consider at least the primary sentencing factors—gravity and nature of the offense, character of the defendant, and public safety—in light of all relevant and available information.

Church, 2002 WI App 212 at ¶15. Thus *Carter*, like *Leonard*, envisions the trial court considering much more than the defendant's conduct at resentencing.

¶29 Here, Judge Schroeder affirmatively stated that the increased sentence was based upon the new and more current information pertaining to the impact of Naydihor's offense on the financial and physical condition of the victim. Based on *Leonard* and *Carter*, we conclude that Wisconsin law favors the consideration of all relevant information at resentencing. This is so whether the information pertains to the defendant or the victim. Thus, the current information pertaining to the victim in this case was relevant to the resentencing decision and was properly considered by Judge Schroeder. Although the new and additional information operated to the detriment of Naydihor, such information might well benefit a defendant in another case.

¶30 This brings us to Naydihor's final argument. Naydihor contends that even if a sentencing court may consider factors other than the defendant's conduct, the factors considered here concerning the victim's condition were not "*new or newly known*" at the time of resentencing.

¶31 In *Denny v. State*, 47 Wis. 2d 541, 178 N.W.2d 38 (1970), the court instructed that in resentencing a defendant, "[a] trial judge is not free to re-evaluate the first sentence; he [or she] is in effect bound by the maximum of the previous sentence unless new factors or newly known factors justify a more severe sentence." *Id.* at 544. Here, Judge Schroeder sentenced Naydihor to two additional years of initial confinement. Consistent with *Denny*, Judge Schroeder determined that the current facts relating to the victim's condition, not known at the time of the original sentencing, warranted an increased sentence. In justifying his departure from Judge Kluka's original sentence, Judge Schroeder stated the following reasons:

[Y]ou have ruined this lady's life. And this case, by the way, is significantly different than what it was when it was

before Judge Kluka because Judge Kluka was working off this presentence, which stated that [the victim] suffered extensive injuries to her leg as a result of this accident, etc. [The victim] indicated that as a result of the injuries suffered to her left leg, she may have some permanent disability. Well, now we know that she will. And, in fact, she says she'll never walk again. That's a monstrous increase in the enormity of this crime from how it appeared before Judge Kluka. When Judge Kluka heard this case, it says [the victim] believes her medical expenses total at least \$30,000.00. Now she says it's \$75,000.00. And she hasn't seen anywhere near the end of it yet.

¶32 Naydihor contends that the facts cited by Judge Schroeder are legally insufficient to justify the increased sentence because Judge Kluka was already aware of the severity of the victim's injuries and of her continuing medical expenses. In support, Naydihor points to the following facts known to Judge Kluka: (1) the victim had incurred somewhere between \$20,000 and \$30,000 in medical expenses and that those expenses were "ongoing"; and (2) the victim would need additional surgery and therapy to treat her injuries and that she had suffered severe financial hardship. In addition, at the original sentencing, the victim's impact statement dated April 11, 2000, indicated that she would be in a wheelchair for six months and would be unable to walk or work during that period. Likewise, the presentence report indicated that she may have some "permanent disability," the extent of which would be officially determined when her cast was removed.

¶33 However, by the time of the resentencing on March 5, 2001, the information regarding the victim's physical and financial condition had changed. Despite predictions that she would be in a wheelchair for six months, the victim indicated at the resentencing that she was still confined to a wheelchair and would probably be forever. She continued to be unable to work or walk. She was facing

a fourth surgery, her medical bills had been approximately \$70,000 and the money she received from her uninsured motorist coverage had been exhausted.

¶34 Naydihor argues that whatever additional information Judge Schroeder learned from the victim, the constant fact remained that the victim's injuries were extensive and the financial impact was substantial. Since this was established before Judge Kluka, Naydihor reasons, there is no justification for an increased sentence. We disagree. The victim's need for a wheelchair extended at least six months past predictions at the time of the original sentencing. While the hardships of those six months—the inability to walk, work or care for her blind husband—remained constant, by the time of the resentencing, the length of the victim's need for a wheelchair was almost twice that considered at the original sentencing. Moreover, the financial impact was almost twice that considered at the original sentencing and was accompanied by information that the victim was now personally responsible for her medical bills because her uninsured motorist coverage had been exhausted.

¶35 We conclude that Judge Schroeder's departure from Judge Kluka's original sentence was justified by new information concerning the impact of Naydihor's offense on the victim's physical and financial condition. We therefore reject Naydihor's claim that Judge Schroeder's sentence was vindictive in violation of his constitutional due process rights.

CONCLUSION

¶36 We conclude that the prosecutor's remarks at the resentencing did not breach the terms of Naydihor's plea agreement and, as a result, Judge Schroeder did not err in denying Naydihor's request for a *Machner* hearing. We further conclude that Judge Schroeder properly considered new information as to

the victim's physical and financial condition prior to resentencing. Finally, we are satisfied that the new information cited by Judge Schroeder was relevant to the sentencing decision and that the increased sentence was not the result of judicial vindictiveness in violation of Naydihor's due process rights. We therefore affirm the judgments and order.

By the Court.—Judgments and order affirmed.

Recommended for publication in the official reports.

EXCERPT FROM 7/6/00 SENTENCING HEARING BEFORE JUDGE KLUKA

1 THE DEFENDANT: No, ma'am. No, ma'am. And
2 that's another reason I'd like to somehow pay the Schwamlein
3 people, or I guess that's their name, you know, help them
4 with their -- their situation which I caused.

5 THE COURT: Thank you. Has Miss Schwamlein and
6 her daughter been given appropriate notification of today's
7 hearing and an opportunity to be present and make a
8 statement?

9 MR. CHIRAFISI: Yes.

10 THE COURT: All right. I'm sentencing you this
11 afternoon for causing injury by intoxicated use of a vehicle.
12 Causing great bodily harm, actually, by intoxicated use of a
13 vehicle. That is a Class D felony punishable by up to 10
14 years in prison and/or a fine of up to \$10,000.

15 In imposing sentence I must consider the
16 incident itself, you as an individual, the interests of this
17 community, and the situation that the victim Miss Schwamlein
18 finds herself in.

19 This is a crime that occurred on February 25,
20 2000. It was about 8:44 in the evening on Highway 31 and
21 County Trunk L. Highway 31 is a very heavily trafficked
22 highway in this county virtually any time of the day or
23 night. You had .265 blood alcohol content. You caused an
24 extremely serious injury. It's amazing there were no
25 fatalities looking at the vehicle that Miss Schwamlein was

1 driving. The whole front end is smashed in. It is
2 literally amazing that she was not injured more
3 significantly.

4 Inside of the vehicle were several bottles of
5 Jim Beam, empty bottles of beer. So, clearly, your
6 violation of the OWI laws was pretty much across the board on
7 that particular occasion.

8 You are 56 years old. You have the prior DUI
9 conviction from September of 1998 for which you were placed
10 on 12 months probation. However, the pre-sentence report
11 indicates that a bench warrant was issued in that case on
12 July 23, 1999 for your failure to comply and failure to pay
13 -- I would imagine failure to pay some type of either fine or
14 cost amount.

15 These other arrests involving alcohol and/or
16 drugs begin in 1981. As they're reported here in New
17 Mexico, DUI. 1984 possession of THC with intents to
18 distribute New Mexico. '92, concealing identity, resisting
19 arrest and so forth. I'm not going to repeat each and every
20 one of them. I don't know about the disposition of those
21 arrests, but clearly, the last paragraph in that section that
22 talks about a 1994 arrest in Albuquerque for DUI, there's a
23 bench warrant out on that case. 1996 felony arrest in New
24 Mexico, Santa Fe, DUI. There's a bench warrant out in that
25 case. So, those are arrests and charges for which you have

1 not yet accounted for; and therefore, there is no conviction
2 or disposition.

3 You come from a large, intact family that
4 apparently has lived a relatively normal life in this
5 community. Your father worked long and hard at American
6 Motors. Your mother ran her own business. You have
7 several brothers and sisters. One of them may have -- says
8 he's a recovering alcoholic, and it's unfortunate you didn't
9 take more of your lifestyle choices from that person rather
10 than pursuing your own interests.

11 You have graduated from high school. Your
12 employment is off and on, I guess is the best way I can
13 describe it. Basically at jobs that do not involve
14 significant regular work hours or other daily requirements so
15 as to hold you to that kind of obligation.

16 Your use of drugs and alcohol began at a
17 relatively early age. You talk about by the age of 18
18 drinking a six-pack each Friday and Saturday. By age 30 the
19 consumption is significant. Some of this no doubt is
20 stemming from your experience in Viet Nam, and I think most
21 people in our society today recognize the significant
22 contribution that Viet Nam veterans made to this country and
23 a contribution that unfortunately that has go unrecognized or
24 not appropriately recognized.

25 However, at this point it is probably 32 years

1 or more since you were discharged from the Army, and that's a
2 long time long time to continue the kind of alcohol
3 consumption that you have continued and has virtually landed
4 you in the circumstance that you find yourself in today.

5 The public has an interest in sentences like
6 this because this could have happened -- the accident could
7 have happened to anyone lawfully upon that highway. Miss
8 Schwamlein and her family happened to be the unfortunate
9 people in the wrong place at the wrong time.

10 There's also -- and I do have to make note of
11 the fact that you did not report to WCS as originally
12 ordered. You did not report to complete this pre-sentence
13 as originally ordered. You did not keep an appointment
14 once. A second appointment was made. The agent certainly
15 has an impression that you do not take these proceedings
16 particularly seriously. There's some significant question,
17 I think, as to your real insight into the extent of your
18 alcoholism and your inability to control that drinking and
19 driving which has -- which is really what brings you here
20 today, the driving.

21 I've looked at the Victim Impact Statement
22 again from Miss Schwamlein. Her injuries are well-described
23 in the criminal complaint as well as this Victim Impact
24 Statement. She is unable to work. She worked as a courier
25 for Best Courier. She can't work until the cast is off.

1 She says that will be 6 months from April. So, she is still
2 in that particular circumstance.

3 I think the most telling part of this Victim
4 Impact Statement is at item 11 where she talks about the
5 impact of this accident on her family's lifestyle, and she
6 says I am now in a wheelchair -- we must all hope that is
7 temporary -- and unable to earn a living. I had to get help
8 to do housework and also to help my husband who is totally
9 blind. So, she has a spouse who is very dependent on her
10 not only for her income, but for other activities and
11 assistance within the household.

12 Not to sentence to you prison would unduly
13 depreciate the seriousness of the crime that you have
14 committed here. I recognize it is a first felony
15 conviction; but again, that is not unusual in cases involving
16 this type of crime.

17 You have caused horrible, horrible injuries,
18 lasting injuries to this woman. You did not have automobile
19 insurance. It is doubtful in my mind as to the restitution
20 ever being paid to her. Hopefully, she will find some
21 avenue of resources to begin to compensate her for the
22 tremendous expense, pain, and suffering that you have put her
23 through.

24 This is a truth in sentencing circumstance;
25 so, the sentence I impose will be in two parts, and you will

1 receive a written explanation of this sentence as well as the
2 sentence that I will impose at this time.

3 The total length of your sentence in 2000 CF
4 212 is 8 years. Your initial terms of confinement in prison
5 is three years and no months. The maximum time you will
6 serve on extended supervision is five years and no months.

7 The time you are confined in prison can be
8 extended if you violate any prison regulation or if you
9 refuse or neglect to perform required or assigned duties.
10 If your time in prison is extended under this bad time
11 provision, you could be required to serve up to the total
12 length of your sentence in prison. The penalties which can
13 be imposed by the Department of Corrections are 10 days for
14 the first offense, 20 days for the second offense, 40 days
15 for the third and each subsequent offense.

16 In addition, if you are placed in adjustment,
17 program, or controlled segregation status, your term of
18 confinement can be extend by a number of days equal to 50
19 percent of the number of days which you spend in adjustment,
20 program, or controlled segregation status.

21 Finally, if while you are in prison you file a
22 lawsuit which the court finds to be filed for a malicious
23 purpose, or solely to harass the party against which it is
24 filed, or if you testify falsely or otherwise knowingly offer
25 false evidence or provide false information to the court in

1 that lawsuit, the court can order that your term of
2 confinement be extended up to the total length of your
3 sentence.

4 While you are on extended supervision, you
5 will be subject to certain conditions. If you violate any
6 of those conditions, you may be returned to prison to serve
7 not more than the time remaining our sentence. The time
8 remaining our sentence is the total length of your sentence
9 less any time served in custody.

10 You are not eligible for the Challenge
11 Incarceration Program due to your age.

12 As to that file, you are also ordered to
13 submit a DNA sample and pay the costs of that; to pay
14 restitution in full as determined within 60 days by the
15 Department of Corrections; to have no contact with Barbara
16 Schwamlein or any of her family members.

17 On 2000 CF 471, I will withhold the imposition
18 of sentence and place you on probation for a period of 10
19 years, consecutive to 2000 CF 212. The length of that
20 probation is the maximum time available because I want that
21 time available to see that as much restitution and
22 compensation is paid to this family as possible.

23 As conditions of probation you are not to
24 consume alcohol or drugs; comply with any alcohol and drug
25 assessment and treatment program; pay restitution in full in

1 file 2000 CF 212; have no contact with Mrs. Schwamlein or
2 members of her family; pay costs of that action. I don't
3 know that it's necessary to order it again, but if it is,
4 submit a DNA sample and pay the \$250 cost of that sample; pay
5 the balance of costs of that action.

6 You can appeal all of this within 20 days.
7 Mr. Rose will go over your rights of appeal.

8 Actually, I will take the costs of both of
9 these files out of the bond on deposit in 2000 CF 212. You
10 are remanded to the custody of the sheriff.

11 - - -
12 PROCEEDINGS CONCLUDED
13 - - -
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF WISCONSIN,

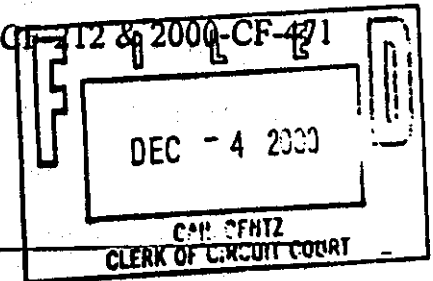
Plaintiff,

v.

Case Nos. 2000-CF-212 & 2000-CF-471

VICTOR NAYDIHOR,

Defendant.

DEFENDANT'S MOTION FOR POSTCONVICTION RELIEF

The defendant, by the undersigned attorney, moves, pursuant to Rule 809.30(2)(h), for postconviction relief from the judgments of conviction entered in the above-entitled cases for the following reasons:

1. Two separate plea agreements were entered in these cases calling for the prosecutor to recommend probation and a fine. Transcript of April 7, 2000 at 2; Transcript of July 6, 2000 at 2.

2. In making this sentencing recommendation to the court, the prosecutor stressed on three separate occasions that he had made the plea agreement before he had seen the presentence report and learned the extent of the defendant's record:

[A]nd what I will tell the court is the agent was able to gather information regarding his prior record that I was -- that I did not have. My recommendation remains the same, but the information about his conduct in, I believe Colorado and New Mexico, was information that I became aware of upon reading the presentence investigation.

I had made a recommendation, and I am sticking to that recommendation based on the plea agreement, even though the

information that is provided in the PSI was not available to me at that time...

* * *

The recommendation that I had made[,] again prior to getting the PSI was a fine, and I'm going to be recommending that the court impose a \$2,000 fine on the felony bail jumping.

Transcript of July 6, 2000 at 7, 10, and 11-12.

3. In *State v. Poole*, 131 Wis. 2d 359, 389 N.W.2d 40 (Ct. App. 1986), the district attorney, like the prosecutor in this case, made a plea agreement calling for a sentencing recommendation and subsequently made the recommendation. However, he explained at sentencing that "this recommendation was agreed to 'before we knew of the other instances. But that is our agreement.'" 131 Wis. 2d at 360. The *Poole* court held that the district attorney's statements

implied that circumstances had changed since the plea bargain, and that had the state known of the other instances of defendant's misconduct, they would not have made the agreement they did.

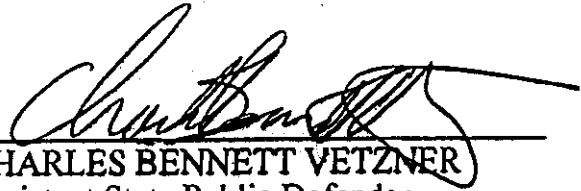
Id. at 359. Accordingly, the court held that the comments constituted a breach of the plea agreement. *Id.*

4. The court in *Poole* did not discuss whether the defense objected to the sentencing recommendation or whether there was an issue of waiver. However, this question was addressed in *State v. Smith*, 207 Wis. 2d 258, 558 N.W.2d 379 (1997). In *Smith*, the court concluded that the failure to object to a prosecutor's breach of a plea agreement was a deficient performance as a matter of law because it "constituted a breakdown in the adversarial system." 207 Wis. 2d at 274. In this case the failure to object was also deficient because it was not a tactical decision but was instead the result of trial counsel's failure to recognize that a breach had occurred based on *State v. Poole, supra*.

5. The *Smith* court further held that prejudice is presumed when the prosecutor violates a plea agreement. 207 Wis. 2d at 281.

WHEREFORE, it is requested that this court conclude that the prosecutor violated the plea agreement, vacate the judgment of conviction and order resentencing before a different judge with directions that the prosecutor comply with the plea agreement.

Dated this 1st day of December, 2000.



CHARLES BENNETT VETZNER
Assistant State Public Defender
State Bar #1013314

Office of the State Public Defender
Post Office Box 7862
Madison, Wisconsin 53707-7862
(608) 266-8374
Attorney for Defendant

STATE OF WISCONSIN

CIRCUIT COURT

KENOSHA COUNTY

STATE OF WISCONSIN,

Plaintiff,

v.

VICTOR NAYDIHOR,

Defendant.

FILED

Case Nos. 00-CF-212, 00-CF-471

JAN 13 2001

GAIL GENTZ
CLERK OF CIRCUIT COURT

ORDER

The defendant having filed a motion for postconviction relief and the district attorney having agreed that the motion should be granted,

IT IS HEREBY ORDERED that the defendant's motion for postconviction relief is GRANTED, that the judgment of conviction is VACATED, that the clerk of this court schedule this case for resentencing before a different judge, and that the district attorney assure the appearance of the defendant at the new sentencing.

Dated this 13th day of January, 2001.

BY THE COURT:



Barbara A. Kluka
BARBARA A. KLUKA
Circuit Judge, Branch 2

CLK

1 DEFENDANT: I'm totally sorry, Ma'am. You are in
2 my prayers daily.

3 THE COURT: Mr. Ginkowski.

4 MR. GINKOWSKI: Thank you, your Honor. I embrace
5 most of the concerns expressed by the victim who spoke
6 to the Court, except one, where she is critically wrong.
7 This is a collision. It's not an accident when there is
8 alcohol-impaired driving involved. We use that term
9 sometimes lightly when we say it's an accident. Maybe
10 we do it because, as is stated to the Court, the
11 defendant didn't mean to do it. But this is not the
12 type of offense where what the defendant means to do has
13 any relevance whatsoever. Alcohol-impaired driving that
14 leads to injury of any sort is a danger, an equal
15 opportunity danger committed by the rich and the poor,
16 persons who have lengthy criminal histories behind them
17 and individuals who, except for their alcohol problem,
18 have never seen the inside of a courtroom as a defendant
19 in a criminal case. The respectable and the less than
20 respectable. But the common denominator is that the
21 threat to the community is just as great regardless of
22 who the defendant is and regardless of the
23 circumstances.

24 And that's one of the things that I point out to
25 the Court because sometimes we look at these things a

1 little too lightly and we fail to recognize the fact
2 that a person who is out of control sometimes is much
3 more of a danger to the community at large and to
4 themselves than someone who commits an act intentionally
5 and who has a focus and a target and knows exactly what
6 they are going to do and limits the scope of what they
7 do. The drunken driver behind the wheel of a fast-
8 moving, two-ton piece of machinery, who is out of
9 control is indiscriminate and substantially more
10 dangerous.

11 The victim impact statement makes a couple of
12 interesting points that were not covered in the oral
13 comments to the Court. Yes, I'm now in a wheelchair and
14 unable to earn a living. I had to get help to do house-
15 work and also to help my husband, who is totally blind.
16 I'm behind in all my bills because I have no income.
17 I'm absolutely terrified of drunk drivers. The fear and
18 anxiety of my family when I was injured so badly was
19 terrible. My 5 year-old granddaughter is still having
20 bad dreams. She asks me, grandma, is the man who hurt
21 you going to stop drinking now. I told her I hope so.
22 And there is a request for a no contact order.

23 What you heard and what you saw is the real face
24 of the consequences of alcohol-impaired driving. It
25 doesn't matter what this defendant or any other

1 defendant intended to do. It's what they did. The
2 crime began by getting behind the wheel of a motor
3 vehicle when the defendant was impaired to the point
4 that he could not safely control his driving or his
5 other behavior. Now, that's just talking about the
6 offense and the offender generically because there are,
7 as I said, these common threads in these cases. This is
8 one of the crimes where the respectable and less than
9 respectable are equally as dangerous.

10 In this case this is exacerbated by the
11 defendant's lack of insight into what has been
12 demonstrated throughout the presentence investigation
13 report as a lengthy history of polysubstance abuse. The
14 fact that while he was out on bond in this case he had a
15 dirty UA as referenced in the report from Wisconsin
16 Correctional Service on April 19, 2000 to this Court.
17 While he was out on bond, he had a dirty UA for
18 marijuana. And also the defendant failed to report to
19 WCS faithfully when he was out on bond when he was given
20 a chance in the community. The defendant with regard to
21 the WCS dirty UA responded, I only smoked the residue in
22 the pipe.

23 The defendant believes he has a drinking problem
24 because he does not know ^{is} why he drinks, but then he says
25 I don't think I'm addicted to anything.

1 This defendant is an individual who needs to be
2 controlled for a lengthy period of supervision because
3 he presents a significant danger to the community and to
4 himself. There is no excuse whatsoever for what
5 happened on February 25th last year. There is no excuse
6 for an otherwise productive citizen of this community to
7 now be confined to a wheelchair, to have bills racking
8 up because of her inability to work and to have her
9 young grandchild in fear when they did nothing wrong and
10 the defendant did everything wrong.

11 The recommendation of the State of Wisconsin in
12 this case is that the Court withhold sentence and place
13 the defendant on probation for a period of ten years to
14 the Wisconsin Division of Corrections.

15 As conditions of that probation, No. 1, the
16 defendant obey all rules of supervision.

17 No. 2, no association with any known felons, drug
18 dealers or drug users.

19 No. 3, no alcohol or non-prescribed controlled
20 substances and then only controlled substances in strict
21 accordance with the prescription order.

22 No. 4, chemical dependency assessments and
23 completing all treatment. For what that's worth, the
24 defendant has been down the assessment road before and
25 it has yet to protect the community. But it certainly

1 needs to be done.

2 No. 5, random UA's, at least weekly because there
3 needs to be extensive monitoring of the defendant.

4 No. 6, counseling to be determined by the agent.
5 This is an individual who has a significant number of
6 problems and they need to be addressed.

7 No. 7, no contact with the victim.

8 No. 8, restitution, which my understanding is yet
9 to be determined because of the ongoing treatment needs.

10 No. 8, no taverns. Not to be present in any
11 tavern period.

12 No. 9, no alcohol containers in the defendant's
13 possession whatsoever at any time.

14 No. 10, no operation of a motor vehicle period.

15 No. 11, not to be present in any liquor store,
16 and that includes any grocery store that sells liquor.

17 No. 12, I skipped 11, nonetheless, next will be
18 the State's recommendation the defendant not to be in
19 any restaurant that serves alcohol.

20 Next, the defendant seems to have a significant
21 amount of free time on his hands. Enough time to go to
22 bars and drink. That is something that needs to be
23 addressed. Since there is ten years of probation time
24 available, 2,000 hours of community service work.

25 In addition to that, there needs to be a

1 punishment component, one year in the Kenosha County
2 Jail. And I do not recommend work release for the
3 defendant simply because of the fact that he is so out
4 of control it is difficult to tell whether he would be
5 out drinking and the community, unfortunately, can't
6 take the chance of saying, 'well, if he's -- if he comes
7 in and he has alcohol on his breath, they can revoke his
8 work release. The community has already been victimized
9 by this defendant and his drinking in operation of a
10 motor vehicle. We don't need a repeat performance.

11 It is very, very necessary that a message be sent
12 this type of behavior will not be tolerated in this
13 community or in any other community in this state; and
14 that individuals who perpetrate these crimes will be
15 held accountable, will be monitored and will understand
16 the reason why.

17 And, unfortunately, all the restitution in the
18 world is not going to give Barbara Schwamlein the
19 ability to walk that she had before February 25, 2000.
20 Thank you, your Honor.

21 THE COURT: Thank you, Mr. Ginkowski. Mr. Moyer.

22 MR. MOYER: Judge, first of all, I believe my
23 client would acknowledge to the Court, and I want the
24 Court to know that he certainly said so to me, that he
25 recognized the great tragedy that his drunken driving on

1 past give him a license to drive drunk. They certainly
2 do not. And he knows that. But they do show, those
3 things show that he has problems, issues that need to be
4 addressed. And we want the Court to consider giving him
5 that chance in the community by allowing him to be on
6 probation and go to the VA Hospital and get the
7 treatment and benefits that he can get as a veteran.
8 Thank you, Judge.

9 THE COURT: Thank you, Mr. Moyer. Mr. Naydihor,
10 is there anything you wish to say before sentence is
11 pronounced?

12 DEFENDANT: I deeply regret what I did to Mrs.
13 Schwamlein. I mean it's the worst thing in my entire
14 life, sir. And I'm done with alcohol totally. If I
15 have an opportunity to address my problems with my
16 veteran's status, post traumatic stress disorder, which
17 I have been diagnosed and pretty much clarifies one of
18 my problems, and alcohol happens to be part of that
19 problem, and I'll never have a drink again. And I would
20 love to try and help Mrs. Schwamlein, get out and make
21 her some money and try and do something.

22 THE COURT: Thank you, Mr. Naydihor. When I
23 started in the criminal courts as an Assistant DA 30
24 years ago, one of the first cases that was assigned to
25 me was a driving while intoxicated charge. And as I

1 started to prepare for the trial, I found out that it
2 was a fatal accident that another motorist had lost his
3 life in. And it just had been treated as, I don't know
4 what the fine was then, a couple hundred bucks, \$183.00
5 maybe, \$183.00 fine. That was all that was going to
6 happen to this person who was intoxicated in the
7 operation of a motor vehicle and took someone else's
8 life. And that was commonplace that cases were handled
9 in that fashion in that era.

10 And it's been a long and arduous struggle to get
11 the law to recognize that this is a very dangerous,
12 violent crime. Something that other countries in the
13 world recognized a long time ago, but even now, even
14 today, is viewed as much less seriously here. And, in
15 fact, the Supreme Court of the United States has chided
16 the State of Wisconsin because Wisconsin is the only
17 state in the whole country where the first offense of
18 driving under the influence is not a crime.

19 A few years ago I had a woman in here and her son
20 was in here for sentencing on a forgery and she said,
21 can I say something? And I said, yeah. And she said a
22 year ago my son was here in another court for -- or my
23 son was killed by a drunk driver and the person was
24 brought into court and for sentencing and all the guy
25 got was a year in jail and now you're telling me my son

1 is facing ten years in prison for writing a \$20.00 bad
2 check.

3 That's unfortunately been the attitude. Back 30
4 years ago, even the particular case that I spoke of I
5 did bring the charge on the felony charge, but as it
6 was, the fellow only spent a few months in jail even
7 after he was found guilty.

8 We have to send a message to people. And when
9 this woman stands up here in the court and talks about
10 what had happened with her son's killer and protesting
11 about it, I'm thinking, we are not getting the message
12 out to you and to other people. Now, you haven't
13 obviously got the message because you have a long
14 history of driving while intoxicated or at least there
15 are some unresolved charges. Apparently you were
16 charged in 1981, DWI, unclear as to the outcome of that.
17 1993, DWI, unclear. Outstanding warrants, I gather from
18 Albuquerque, New Mexico, 4/4 of 94, DWI. 1/26/96,
19 felony DWI from Sante Fe, New Mexico. In 1998,
20 conviction from Colorado, DUI. And now this.

21 And you have ruined this lady's life. And this
22 case, by the way, is significantly different than what
23 it was when it was before Judge Kluka because Judge
24 Kluka was working off this presentence, which stated
25 that Mrs. Schwamlein suffered extensive injuries to her

1 leg as a result of this accident, etc.. Ms. Schwamlein
2 indicated that as a result of the injuries suffered to
3 her left leg, she may have some permanent disability.
4 Well, now we know that she will. And, in fact, she says
5 she'll never walk again. That's a monstrous increase in
6 the enormity of this crime from how it appeared before
7 Judge Kluka. When Judge Kluka heard the case, it says
8 Mrs. Schwamlein believes her medical expenses total at
9 least \$30,000.00. Now she says it's \$75,000.00. And
10 she hasn't seen anywhere near the end of it yet. This
11 is a serious, violent crime. Much more serious than
12 most of the things we see passing through the courts.
13 And you have got an ugly history, sir. And I
14 don't want to take anything away from your heroic
15 service to our country. And we are all in your debt for
16 that. And I don't think for one minute that as I
17 approach this case I haven't given great credit to your
18 honorable discharge and your service in time of war.
19 But I can't escape the serious problems that some folks
20 have suffered as a consequence of their tour of duty
21 overseas. I have to think about you read about what was
22 done in Europe and particularly to the Jews in Europe,
23 parents who saw their children murdered before their
24 eyes and children who saw their parents slaughtered
25 before their eyes and families separated and unspeakable

1 tortures and horrors. I have never seen it claimed that
2 there is a higher incidence of driving while intoxicated
3 among holocaust survivors than among the general
4 population. I mean you can always try to find some
5 excuse for behavior.

6 And I don't want to say you haven't been through
7 things that I wouldn't change places with you for
8 anything. But I can't look at that as an excuse for a
9 monstrous crime like this. And last year -- no last
10 year figures are available, 1999. 15,786 people killed
11 in alcohol-related crashes in the United States. With
12 all the discussion there has been about guns, and there
13 is another school shooting today I see, the number of
14 people killed by guns in this country doesn't even
15 approach that killed by drunk drivers.

16 So it's important to send a message to people
17 like you. I don't know. You tell me you're sorry.
18 You'll never do anything like this again. I don't know
19 what you told other judges on other occasions. I don't
20 know what your thoughts were on other occasions. I know
21 that the essence of this crime is not alcoholism or
22 persistent drinking or every day drinking or getting
23 drunk and being perpetually drunk. The essence of this
24 crime is the selfish act of deliberately choosing to
25 operate a motor vehicle after you have been drinking.

1 You have no excuse for it. You have done great damage.
2 And it's important to send a message to you with all
3 your history and to send to the public generally this
4 will not be tolerated.

5 And so I do think that imprisonment is a
6 component of the disposition of this case, which is
7 absolutely essential. And I do think that long-term
8 supervision is an essential component. And I do think
9 that an aggressive program needs to be instituted when
10 you're released from prison to insure that you're
11 working extra hours to try to help this woman out
12 financially for her financial losses as a result of this
13 crime. And in that light, when you're released from
14 prison, keep in mind that the average work week a
15 century ago was 60 hours. So when people come in here
16 and they have done great harm to others by their acts
17 and they come in and they are working 35, 40 hours a
18 week and say that they are earning all they can, I don't
19 buy into that because having done great wrong to
20 another, you have to make a special effort to earn extra
21 income to pay back. That's an essential.

22 Presentence investigation report at the time that
23 the injuries were thought to be less severe than they
24 are recommended a 5 to 6-year period of confinement in
25 the state prison, followed by 3 to 4 years of extended

1 supervision. I think that is a little light on the
2 extended supervision department, but I think it's an
3 appropriate confinement period.

4 And I do have to say that I do not think that the
5 district attorney's recommendation is appropriate due to
6 the enormity of this crime.

7 So unless there is some reason why sentence
8 should not be pronounced, I'll ask the defendant please
9 stand for sentence.

10 One more thing I wanted to say. I have no idea
11 whether the remorse you expressed today comes from your
12 heart or whether it is something that is expressed. It
13 is the unfortunate fact that some of what comes from the
14 table there is not always sincere. And some of it is
15 sincere, but it's paper thin. And I don't pass any
16 judgment on yours at all.

17 The only thing I can tell you is the plea
18 agreement that you made in this case was a plea
19 agreement. You made a deal with the district attorney
20 by getting some charges dismissed and by getting some
21 sentence concessions. That is -- that is not improper
22 under our law at all. And I don't view that negatively.
23 But someone who would come in at the first instance come
24 into court and say I was wrong, I did wrong, I've done
25 great harm to this woman, that's true remorse. Then the

1 judge doesn't have to guess. And so I don't in any way
2 criticize or disbelieve your claim of remorse. It's
3 just that it's not something that I feel comfortable
4 basing a lot on.

5 But on Case No. 212, it is the sentence of the
6 Court that your custody be committed to the Wisconsin
7 Department of Corrections for a term of 10 years with an
8 initial confinement period of 5 years and an extended
9 supervision period of 5 years to follow. And on the
10 Case No. 471, sentence will be withheld in that case,
11 meaning that you can still receive the maximum period of
12 10 years confinement; and you are placed on probation on
13 that case for a period of 10 years consecutively to Case
14 No. 212.

15 You may be seated, sir. The total length of your
16 sentence on case No. 212 is 10 years, of which 5 years
17 is initial confinement and 5 years is extended
18 supervision. The time that you are actually confined in
19 prison can be extended if you violate any prison
20 regulation or if you refuse or neglect to perform
21 required or assigned duties. If your time in prison is
22 extended under this bad time provision, you could be
23 required to serve up -- up to the total length of your
24 sentence in prison. The penalties which can be imposed
25 by the Department of Corrections is 10 days for the

STATE OF WISCONSIN
IN SUPREME COURT

Nos. 01-3093-CR and 01-3094-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VICTOR NAYDIHOR,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF AP-
PEALS, DISTRICT II, AFFIRMING A JUDGMENT OF
CONVICTION AND AN ORDER DENYING POST-
CONVICTION RELIEF ENTERED IN THE CIRCUIT
COURT FOR RACINE COUNTY, THE HONORABLE
BRUCE E. SCHROEDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

PEGGY A. LAUTENSCHLAGER
Attorney General

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263
Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	1
STATEMENT ON ORAL ARGUMENT AND PUBLICATION.....	2
STANDARD OF REVIEW.....	2
ARGUMENT	3
I. THE TRIAL COURT CORRECTLY HELD THAT NAYDIHOR WAS NEITHER ENTITLED TO A HEARING NOR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.	3
II. THE INCREASED SENTENCE NAYDIHOR RECEIVED WAS NOT THE RESULT OF VINDICTIVENESS.	14
A. Since a different judge resentenced Naydihor, no presumption arises.....	17
B. Considering all the factors, a presumption of judicial vindictiveness is not warranted in this case.	19
C. Evidence of the greater impact of the crime on the victim overcomes any presumption of vindictiveness.....	21
CONCLUSION	27

CASES CITED

Alabama v. Smith, 490 U.S. 794 (1989).....	16, 18, 19, 23-24
Chaffin v. Stynchcombe, 412 U.S. 17 (1973).....	18, 19, 20, 21
Colten v. Kentucky, 407 U.S. 104 (1972).....	17-18, 20
Gauntlett v. Kelley, 849 F.2d 213 (6th Cir. 1988)	19
Graham v. State, 681 So.2d 1178 (Fla. App. 2 Dist. 1996).....	19
Jackson v. State, 766 S.W.2d 518 (Tex. Crim. App. 1988)	19
Mele v. Fitchburg Dist. Court, 884 F.2d 5 (1st Cir. 1989).....	20
North Carolina v. Pearce, 395 U.S. 711 (1969).....	2, 14, 15, 17, 18, 19, 20, 22, 23, 24, 25, 26
Payne v. Tennessee, 501 U.S. 808 (1991).....	24
People v. Mазzie, 413 N.W.2d 1 (Mich. 1987).....	19
People v. Young, 723 N.E.2d 58 (N.Y. 1999).....	19, 25

	Page
Rock v. Zimmerman, 959 F.2d 1237 (3rd Cir. 1992).....	19
Ross v. State, 480 So. 2d 1157 (Miss. 1985).....	25
San Roman v. State, 842 S.W.2d 801 (Tex. App.-El Paso 1992).....	25
State v. Bruce, 642 N.E.2d 12 (Ohio App. 12 Dist. 1994).....	25
State v. Church, 2002 WI App. 212, 257 Wis. 2d 442, 650 N.W.2d 873	15, 21
State v. Church, 2003 WI 74, 262 Wis. 2d 678, 665 N.W.2d 141	2, 15, 21
State v. Coleman, 700 A.2d 14 (Conn. 1997).....	19
State v. Forsyth, 761 P.2d 363 (Mont. 1988).....	19
State v. Hall, 2002 WI App. 108, 255 Wis. 2d 662, 648 N.W.2d 41	24
State v. Hanson, 2000 WI App 10, 232 Wis. 2d 291, 606 N.W.2d 278	4
State v. Johnson, 153 Wis. 2d 121, 449 N.W.2d 845 (1990)	3
State v. Leonard, 39 Wis. 2d 461, 159 N.W.2d 577 (1968)	15

	Page
State v. Machner, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)	3
State v. Macomber, 769 P.2d 621 (Ks. 1989)	19
State v. Naydihor, 2002 WI App. 272, 258 Wis. 2d 746, 654 N.W.2d 479	15
State v. Neville, 572 So.2d 1161 (La. App. 1 Cir. 1990)	19
State v. Percy, 595 A.2d 248 (Vt. 1990)	19
State v. Spears, 227 Wis. 2d 495, 596 N.W.2d 375 (1999)	24
State v. Williams, 2002 WI 1, 249 Wis. 2d 492, 637 N.W.2d 733	2, 4, 12, 13, 14
Strickland v. Washington, 466 U.S. 668 (1984)	3
Texas v. McCullough, 475 U.S. 134 (1986)	15, 16, 18, 19, 20, 21, 23, 24, 26
United States v. Cheek, 3 F.3d 1057 (7th Cir. 1993)	19
United States v. Goodwin, 457 U.S. 368 (1982)	15-16, 23

	Page
United States v. Sanders, 197 F.3d 568 (1st Cir. 1999).....	25
Wasman v. United States, 468 U.S. 559 (1984).....	15, 16, 22, 24, 26

STATUTES CITED

Wis. Stat. § 950.01	24
Wis. Stat. § 973.09(4).....	11

STATE OF WISCONSIN
IN SUPREME COURT

Nos. 01-3093-CR and 01-3094-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

VICTOR NAYDIHOR,

Defendant-Appellant-Petitioner.

REVIEW OF A DECISION OF THE COURT OF AP-
PEALS, DISTRICT II, AFFIRMING A JUDGMENT OF
CONVICTION AND AN ORDER DENYING POST-
CONVICTION RELIEF ENTERED IN THE CIRCUIT
COURT FOR RACINE COUNTY, THE HONORABLE
BRUCE E. SCHROEDER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

QUESTIONS PRESENTED

1. Was Naydihor entitled to a hearing on his claim that his counsel was ineffective for not objecting to the prosecutor's alleged breach of the plea agreement – an implicit message to the trial court that the prosecutor questioned the wisdom of the plea agreement?

Both the circuit court and the Court of Appeals found the prosecutor did not breach the plea agreement and, therefore, Naydihor was not entitled to a hearing.

2. Did a presumption of judicial vindictiveness under *North Carolina v. Pearce*, 395 U.S. 711 (1969), arise when a second judge imposed a harsher sentence after Naydihor's successful postconviction motion?

3. If a presumption of judicial vindictiveness arose, was it overcome by the circuit court's reliance on more complete information about victim impact?

Both the circuit court and the court of appeals found the sentence was not vindictive and, therefore, not a violation of due process.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are warranted.

STANDARD OF REVIEW

In reviewing a breach of plea agreement case, this court will uphold the circuit court's determination of historical facts—the terms of the plea agreement and the State's conduct in question—unless they are clearly erroneous. *State v. Williams*, 2002 WI 1, ¶20, 249 Wis. 2d 492, 637 N.W.2d 733. However, whether the State's conduct constitutes a substantial and material breach of the plea agreement presents a question of law. *Id.*

Whether an increased sentence on resentencing violates due process presents a question of law, which this court reviews, *de novo*. *State v. Church*, 2003 WI 74, ¶17, 262 Wis. 2d 678, 665 N.W.2d 141.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT NAYDIHOR WAS NEITHER ENTITLED TO A HEARING NOR RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

Naydihor first argues that the prosecutor breached the plea agreement in this case by implicitly conveying a message to the trial court that he was questioning the wisdom of the plea agreement. Naydihor's brief at 11-12.

Naydihor recognizes that his counsel did not object to the state's "improper argument at resentencing." Naydihor's brief at 13. He therefore argues that this court should remand the case for a hearing pursuant to *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

To establish the denial of effective assistance of trial counsel, a defendant must prove both that the counsel's performance was deficient and that such deficient performance prejudiced his case. *State v. Johnson*, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The trial court denied the postconviction motion because it did not believe there was a breach of the plea agreement. If, as the circuit court found, the state's conduct does not constitute a substantial and material breach of the plea agreement, then Naydihor cannot make a claim of ineffective assistance of counsel because he cannot establish deficient performance and he was not entitled to a *Machner* hearing. If, however, this court determines the state's conduct did constitute a substantial and material breach of the plea agreement, the state agrees that a *Machner* hearing is necessary.

The state agrees that the accused has a constitutional right to the enforcement of a negotiated plea agreement. Once an accused agrees to plead guilty in reliance on a prosecutor's promise to perform a future act, the accused's due process rights demand fulfillment of that bargain. *Williams*, 249 Wis. 2d 492, ¶37.

An actionable breach must not be merely a technical breach. It must be a material and substantial breach. When the breach is material and substantial, a plea may be vacated or an accused may be entitled to resentencing. A material and substantial breach is a violation of the terms of the agreement that defeats the benefit for which the accused bargained. *Williams*, 249 Wis. 2d 492, ¶38.

While a prosecutor need not enthusiastically recommend a plea agreement, "end runs" around a plea agreement are prohibited. *Williams*, 249 Wis. 2d 492, ¶42. "The State may not accomplish by indirect means what it promised not to do directly, and it may not covertly convey to the trial court that a more severe sentence is warranted than that recommended." *Id.*, quoting *State v. Hanson*, 2000 WI App 10, ¶24, 232 Wis. 2d 291, 606 N.W.2d 278.

Although Naydihor claims at several points that the terms of the plea agreement are not in dispute, he sets forth the plea agreement as "[d]efendant entered pleas to felony offenses based on the State's promise it would cap its argument at jail time, probation, with conditions, and a fine at sentencing." Naydihor's brief at 4. Because the state reads this statement as inconsistent with the recitation of the plea agreement, the state will set forth the agreement as it appears in the plea transcript:

MR. CHIRAFISI: Judge, the agreement is that the defendant would be entering a plea to Count 1, which is injury by intoxicated use of a vehicle. Count 3, which is the prohibited alcohol concentration, would be dismissed.

In regards to the TR files, judge, the defendant is going to be entering a plea to 1518, which is open intoxicants in a vehicle. The remaining citations will be dismissed.

The State is agreeing to recommend probation, but retains a free hand on the conditions of that probation.

MR. ROSE: You're also dismissing Count 2.

MR. CHIRAFISI: Count 2 has already been dismissed, Judge.

THE COURT: Thank you. Correct, Mr. Rose?

MR. ROSE: That is correct. Count 2 was dismissed at the initial appearance, but I see it was carried over in the information.

(15:2-3.)¹

Because Mr. Chirafisi indicated in argument to the trial judge, the Honorable Barbara Kluka, at the initial sentencing, that he had become aware of certain driving while intoxicated convictions since the agreement was reached, Naydihor was granted a resentencing before a new judge. Mr. Ginkowski appeared on behalf of the state at that resentencing. His comments prior to the sentence are set forth in their entirety.

¹ Although there is no mention of the fine on the plea to bail jumping in this recitation, the trial court found that the parties and the court were aware of this term (47:23-24) and Naydihor does not rest his argument on the absence of that term.

MR. GINKOWSKI: Thank you, your Honor. I embrace most of the concerns expressed by the victim who spoke to the Court, except one, where she is critically wrong. This is a collision. It's not an accident when there is alcohol-impaired driving involved. We use that term sometimes lightly when we say it's an accident. Maybe we do it because, as is stated to the Court, the defendant didn't mean to do it. But this is not the type of offense where what the defendant means to do has any relevance whatsoever. Alcohol-impaired driving that leads to injury of any sort is a danger, an equal opportunity danger committed by the rich and the poor, persons who have lengthy criminal histories behind them and individuals who, except for their alcohol problem, have never seen the inside of a courtroom as a defendant in a criminal case. The respectable and the less than respectable. But the common denominator is that the threat to the community is just as great regardless of who the defendant is and regardless of the circumstances.

And that's one of the things that I point out to the Court because sometimes we look at these things a little too lightly and we fail to recognize the fact that a person who is out of control sometimes is much more of a danger to the community at large and to themselves than someone who commits an act intentionally and who has a focus and a target and knows exactly what they are going to do and limits the scope of what they do. The drunken driver behind the wheel of a fast-moving, two-ton piece of machinery, who is out of control is indiscriminate and substantially more dangerous.

The victim impact statement makes a couple of interesting points that were not covered in the oral comments to the Court. Yes, I'm now in a wheelchair and unable to earn a living. I had to get help to do housework and also to help my husband, who is totally blind. I'm behind in all my bills because I have no income. I'm absolutely terrified of drunk drivers. The fear and anxiety of my family when I was injured so badly was terrible. My 5 year-old granddaughter is still having bad dreams. She asks me, grandma, is the man who hurt you going to stop drinking now. I told her I hope so. And there is a request for a no contact order.

What you heard and what you saw is the real face of the consequences of alcohol-impaired driving. It doesn't matter what this defendant or any other defendant intended to do. It's what they did. The crime began by getting behind the wheel of a motor vehicle when the defendant was impaired to the point that he could not safely control his driving or his other behavior. Now, that's just talking about the offense and the offender generically because there are, as I said, these common threads in these cases. This is one of the crimes where the respectable and less than respectable are equally as dangerous.

In this case this is exacerbated by the defendant's lack of insight into what has been demonstrated throughout the presentence investigation report as a lengthy history of polysubstance abuse. The fact that while he was out on bond in this case he had a dirty UA as referenced in the report from Wisconsin Correctional Service on April 19, 2000 to this Court. While he was out on bond, he had a dirty UA for marijuana. And also the defendant failed to report to WCS faithfully when he was out on bond when he was given a chance in the community. The defendant with regard to the WCS dirty UA responded, I only smoked the residue in the pipe.

The defendant believes he has a drinking problem because he does not know why he drinks, but then he says I don't think I'm addicted to anything.

This defendant is an individual who needs to be controlled for a lengthy period of supervision because he presents a significant danger to the community and to himself. There is no excuse whatsoever for what happened on February 25th last year. There is no excuse for an otherwise productive citizen of this community to now be confined to a wheelchair, to have bills racking up because of her inability to work and to have her young grandchild in fear when they did nothing wrong and the defendant did everything wrong.

The recommendation of the State of Wisconsin in this case is that the Court withhold sentence and place the defendant on probation for a period of ten years to the Wisconsin Division of Corrections.

As conditions of that probation, No. 1, the defendant obey all rules of supervision.

No. 2, no association with any known felons, drug dealers or drug users.

No. 3, no alcohol or non-prescribed controlled substances and then only controlled substances in strict accordance with the prescription order.

No. 4, chemical dependency assessments and completing all treatment. For what that's worth, the defendant has been down the assessment road before and it has yet to protect the community. But it certainly needs to be done.

No. 5, random UA's, at least weekly because there needs to be extensive monitoring of the defendant.

No. 6, counseling to be determined by the agent. This is an individual who has a significant number of problems and they need to be addressed.

No. 7, no contact with the victim.

No. 8, restitution, which my understanding is yet to be determined because of the ongoing treatment needs.

No. 8, no taverns. Not to be present in any tavern period.

No. 9, no alcohol containers in the defendant's possession whatsoever at any time.

No. 10, no operation of a motor vehicle period.

No. 11, not to be present in any liquor store, and that includes any grocery store that sells liquor.

No. 12, I skipped 11, nonetheless, next will be the State's recommendation the defendant not to be in any restaurant that serves alcohol.

Next, the defendant seems to have a significant amount of free time on his hands. Enough time to go to bars and drink. That is something that needs to be ad-

dressed. Since there is ten years of probation time available, 2,000 hours of community service work.

In addition to that, there needs to be a punishment component, one year in the Kenosha County Jail. And I do not recommend work release for the defendant simply because of the fact that he is so out of control it is difficult to tell whether he would be out drinking and the community, unfortunately, can't take the chance of saying, well, if he's -- if he comes in and he has alcohol on his breath, they can revoke his work release. The community has already been victimized by this defendant and his drinking in operation of a motor vehicle. We don't need a repeat performance.

It is very, very necessary that a message be sent this type of behavior will not be tolerated in this community or in any other community in this state; and that individuals who perpetrate these crimes will be held accountable, will be monitored and will understand the reason why.

And, unfortunately, all the restitution in the world is not going to give Barbara Schwamlein the ability to walk that she had before February 25, 2000. Thank you, your Honor.

(39:11-16.)

It is the state's position that these comments do not constitute a material and substantial breach of the plea agreement. First, it is important to note that, although the state agreed to recommend probation, it did not agree to a particular length of time for that probation or to the conditions of that probation. The state was, then, free to argue for a length of probation and restrictive conditions upon that probation. Mr. Ginkowski's comments are directed at convincing the court that a lengthy period of probation which he characterizes as a "lengthy period of supervision" (39:14) be imposed and what can only be characterized as rather restrictive conditions of probation.

The state recommended ten years of probation (39:14) and a number of conditions, which are fairly commonplace. For instance: no association with known felons, drug dealers or drug users (39:14); no alcohol or nonprescription controlled substances (39:14); chemical dependency assessments and completing treatment (39:14); no contact with the victim (39:15); and restitution (39:15). However, the length of probation, ten years, is substantial.

In addition, several of the conditions for which Mr. Ginkowski argued are quite restrictive. For instance, he argued for random urine testing (UA) at least weekly (39:15); and that the defendant not be present in any liquor store or grocery store which sells liquor and that he not be allowed in any restaurant that serves alcohol (39:15). He also argued for the maximum confinement in the Kenosha County Jail, one year (39:16), and he recommended against work release for the entire period (39:16).

Mr. Ginkowski referred to several facts, which he believed demonstrated Naydihor's lack of insight. These included a history of polysubstance abuse and a "dirty UA" while out on bond (39:13). These items certainly directly supported Ginkowski's recommendation for at least weekly random UAs as a condition of probation. Ginkowski also referenced Naydihor's minimization of the marijuana use evidenced by his "dirty UA" and the inconsistency that he admitted that he had a drinking problem, but was not addicted to anything (39:13). Again, these comments supported Ginkowski's argument that Naydihor required a lengthy period of supervision with restrictive conditions, such as random UA testing and no presence in any commercial establishment, liquor store, grocery store, or restaurant in which liquor was sold.

After stating other conditions in a list manner, Ginkowski observed that Naydihor seemed to have a significant amount of free time on his hands, enough to go to bars and drink and that was something that needed to be addressed. He therefore recommended 2,000 hours of community service work over the ten-year probationary period (39:15).

Mr. Ginkowski's comments did call to the court's attention that alcohol-impaired driving was a danger to the community (39:11) and that a person who was out of control driving a "fast-moving, two-ton piece of machinery" was perhaps more dangerous than an individual focusing on one target because the drunken driver out of control was indiscriminate in who might be injured (39:12).

Ginkowski also pointed out that the community had already been victimized by Naydihor and his drinking and driving, that it was necessary to send a message that this type of behavior would not be tolerated and that persons who perpetrate crimes involving intoxicated motor vehicle operation would be held accountable (39:16). These arguments were presented to the court in justification of a one-year period of jail time as a condition of probation. One year is, of course, the maximum allowed as a condition of probation. Wis. Stat. § 973.09(4). It also justified Ginkowski's recommendation that Naydihor not be allowed work release during the one year of confinement.

Ginkowski did draw the court's attention to the victim-impact statement, but he only reiterated what the victim had already personally expressed to the court, that she was in a wheelchair, unable to earn a living, that she had to obtain help for her totally blind husband, that she was behind in bills and had become terrified of drunk drivers (39:12). He also reiterated her comment that other members of her family, specifically, her five-year-old granddaughter, harbored a fear of intoxicated drivers (39:12).

He did not elaborate on this beyond restating the facts, which the victim imparted to the court.

Ginkowski never referred to a prison term or incarceration in prison in any way. He did indicate that Naydihor was "an individual who needs to be controlled for a lengthy period of supervision because he presents a significant danger to the community and to himself" (39:14). This does not in any way suggest that Ginkowski did not agree with his recommendation of ten years' probation with restrictive conditions. That recommendation is totally consistent with the agreement that he would recommend probation but that he was free to argue the conditions and length.

A material and substantial breach of the terms of the agreement is one that defeats the benefit for which the accused bargained. *Williams*, 249 Wis. 2d 492, ¶38. Naydihor contends that Ginkowski's comments deprived him of the benefit of his bargain. But he only bargained for a probation recommendation, which he clearly received. The state specifically retained "a free hand" on the conditions of probation and, implicitly, the length, since no length was set forth in the agreement. Ginkowski's arguments did not deprive Naydihor of the benefit of that bargain. The comments were directly related to the restrictive conditions, which Ginkowski recommended to the court. They did not signal to the trial court that Ginkowski was dissatisfied with the agreement.

Naydihor complains that the prosecutor's presentation as "far from a neutral recitation of the facts." Naydihor's brief at 12. However, he is not entitled to a neutral recitation of the facts. He is entitled to a neutral recitation of the terms of the plea agreement. *Williams*, 249 Wis. 2d 492, ¶42. The fact that the state reserved a free hand to argue about the conditions of probation is inconsistent with agreeing to a neutral recitation of the facts. To argue about the conditions of probation necessarily requires use

of negative facts in support of the conditions advanced. Thus, Naydihor did not bargain for and may not complain of a less than neutral recitation of the facts. He was entitled to a neutral recitation of the terms of the plea agreement and he received such a recitation.

Naydihor claims that this case is controlled by *Williams* because it is very similar. Naydihor's brief at 9. However, Williams argued that the

State stepped over the fine line [between its duty to convey relevant information to the sentencing court and its duty to honor the plea agreement] by appearing to adopt as its own view the unfavorable information about the defendant from the presentence investigation report and the ex-wife, rather than merely relaying that information to the sentencing court.

Williams, 249 Wis. 2d 492, ¶45. Williams contended that the state conveyed to the trial court that it no longer supported the plea agreement and this court agreed.

Here, Ginkowski never appeared to adopt any information, either from the victim's statement or the presentence investigation report. He did reiterate the victim-impact statement by stating the facts. This comprised one paragraph of the transcript and was unaccompanied by any further argument other than to indicate these facts demonstrated the consequences of alcohol-impaired driving (39:12).

Ginkowski also referred to a "lengthy history of poly-substance abuse" (39:13), without further comment. He argued that this and Naydihor's dirty UA demonstrated his "lack of insight" into his problem. Nowhere does Ginkowski imply that, had the state known more about Naydihor, it would not have entered into the plea agreement as the prosecutor in *Williams* did. *Williams*, 249 Wis. 2d 492, ¶47. Nor did he adopt either the victim's statement or the presentence writer's report as his own opinion, as was done in *Williams*. *Williams*, 249 Wis. 2d

492, ¶48. In *Williams*, this court agreed with the court of appeals that “what the prosecutor may not do is personalize the information, adopt the same negative impressions as [the author of the presentence investigation report] and then remind the court that the [author] had recommended a harsher sentence than recommended.” *Id.* The *Williams* case is distinguishable.

While Ginkowski’s comments can fairly be characterized as argument, rather than neutral recitation, the state had retained the right to present that argument. Naydihor obtained exactly what he bargained for. The fact that the court did not agree is not evidence that the plea agreement was breached.

Because there was not a material and substantial breach of the plea agreement, there cannot be ineffective assistance of trial counsel for failure to object to the state’s argument. For this reason, no remand is necessary.

II. THE INCREASED SENTENCE NAYDIHOR RECEIVED WAS NOT THE RESULT OF VINDICTIVENESS.

Naydihor next argues that he was denied due process when Judge Schroeder imposed a harsher sentence after the successful postconviction motion than had Judge Kluka in the original sentencing. Judge Kluka originally sentenced Naydihor to an initial term of confinement of three years, followed by extended supervision for five years (24:22). At the resentencing, Judge Schroeder sentenced Naydihor to an initial term of confinement of five years, followed by extended supervision for five years. Relying on *North Carolina v. Pearce*, 395 U.S. 711 (1969), Naydihor argues that the increased sentence was vindictive and a violation of due process.

The court of appeals rejected Naydihor's argument based on its decision in *State v. Church*, 2002 WI App. 212, 257 Wis. 2d 442, 650 N.W.2d 873. *State v. Naydihor*, 2002 WI App. 272, ¶26, 258 Wis. 2d 746, 654 N.W.2d 479. This court has since reversed the court of appeals' *Church* decision. The state will, therefore, address the claim of judicial vindictiveness without reference to the court of appeals' reliance on *State v. Leonard*, 39 Wis. 2d 461, 473, 159 N.W.2d 577 (1968). As the state reads this court's *Church* decision, Wisconsin now determines the constitutionality of an increased sentence upon resentencing by reference to *Pearce* and its progeny. *Church*, 262 Wis. 2d 678, ¶52.

In *Pearce*, the United States Supreme Court held that due process requires that vindictiveness against a defendant for having successfully obtained a reversal of the first conviction must play no part in the sentence that defendant receives after a new trial. *Pearce*, 395 U.S. at 725. The Court also held that a defendant must be free of apprehension of such a retaliatory motivation on the part of a sentencing judge. *Id.* The Court fashioned what is, in essence, a prophylactic rule. See *Wasman v. United States*, 468 U.S. 559, 564 (1984). "[W]henver a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Pearce*, 395 U.S. at 726; *Wasman*, 468 U.S. at 564-65.

The *Pearce* rule has been read to "[apply] a presumption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *Wasman*, 468 U.S. at 565, citing *United States v. Goodwin*, 457 U.S. 368, 374 (1982). However, the *Pearce* presumption "does not apply in every case where a convicted defendant receives a higher sentence on retrial." *Texas v. McCullough*, 475 U.S. 134, 138 (1986). "Given the severity of such a presumption, however--which may operate in the absence of any proof of an improper motive and thus may block a legitimate

response to criminal conduct--the Court has [applied the presumption] only in cases in which a reasonable likelihood of vindictiveness exists." *Goodwin*, 457 U.S. at 373. The existence of a reasonable likelihood of vindictiveness is "where [the presumption's] 'objectives are thought most efficaciously served.'" *Alabama v. Smith*, 490 U.S. 794, 799 (1989).

Accordingly, in each case, we look to the need, under the circumstances, to "guard against vindictiveness in the resentencing process." *Chaffin v. Stynchcombe*, 412 U.S. 17, 25, 93 S.Ct. 1977, 1982, 36 L.Ed.2d 714 (1973) (emphasis omitted). For example, in *Moon v. Maryland*, 398 U.S. 319, 90 S.Ct. 1730, 26 L.Ed.2d 262 (1970), we held that *Pearce* did not apply when the defendant conceded and it was clear that vindictiveness had played no part in the enlarged sentence. In *Colten v. Kentucky*, 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), we saw no need for applying the presumption when the second court in a two-tier trial system imposed a longer sentence. In *Chaffin*, *supra*, we held *Pearce* not applicable where a jury imposed the increased sentence on retrial.

McCullough, 475 U.S. at 138. Where the circumstances do not require the presumption's application, a defendant must affirmatively prove actual vindictiveness. *Wasman*, 468 U.S. at 569.

The circumstances in this case do not require a presumption of vindictiveness for several reasons. First, a different judge resentenced Naydihor in this case. Second, the resentencing resulted from the first trial judge granting a resentencing on postconviction motion not after a reviewing higher court reversed on appeal. Third, the error, which caused the resentencing, was not the trial judge's error but the prosecutor's error. Fourth, this case involves a resentencing not a retrial.

A. Since a different judge resentenced Naydihor, no presumption arises.

Pearce was a consolidated case in which the two defendant's involved received increased sentences some years after their original sentences. *Pearce*, 395 U.S. at 713-16. The opinion never specifically indicates whether the judge who imposed the second sentence was the same as the first.

The first case in which the Court clearly confronted circumstances where a different judge imposed an increased sentence was *Colten v. Kentucky*, 407 U.S. 104 (1972). There the Court considered whether the *Pearce* presumption applied to an increased sentence imposed in Kentucky's two-tiered system for adjudicating less serious criminal cases. Under this system, Colten was first tried in an "inferior" court. After his conviction, he had an absolute right to a trial *de novo* in a court of general criminal jurisdiction so long as his "appeal" was timely. *See id.* at 111-13. When he was again convicted, his sentence was set at a \$50 fine, rather than the \$10 fine set after the inferior court trial. *Id.* at 108.

The Court refused to apply the *Pearce* presumption because

[Kentucky's] two-tier system of administering criminal justice, however, does not lead us to believe, ... that the hazard of being penalized for seeking a new trial, which underlay the holding of *Pearce*, also inheres in the *de novo* trial arrangement. Nor are we convinced that defendants convicted in Kentucky's inferior courts would be deterred from seeking a second trial out of fear of judicial vindictiveness. The possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system.

We note first the obvious: that the court which conducted Colten's trial and imposed the final sentence was not the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal; and it is not the court that is asked to do over what it thought it had al-

ready done correctly. Nor is the *de novo* court even asked to find error in another court's work.

Colten, 407 U.S. at 116.

The Court reaffirmed the general principles of *Colten* in *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), when, in states which entrust punishment to juries, it refused to extend the *Pearce* presumption to a resentencing by a jury after a second trial. The Court believed “[t]he potential for ... abuse of the sentencing process by the jury is ... *de minimis* in a properly controlled retrial.” *Chaffin*, 412 U.S. at 26. The Court noted that, as in *Colten*, “the second sentence is not meted out by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to have required a reversal of the conviction.” *Id.* at 27.

In *McCullough*, the court considered the circumstance where the jury had imposed sentence in the first trial and a judge imposed an increased sentence after granting a new trial for prosecutor misconduct. *McCullough*, 475 U.S. at 136. Although it was not the only reason, the Court noted, “[t]he presumption is also inapplicable because different sentencers assessed the varying sentences that *McCullough* received. In such circumstances, a sentence ‘increase’ cannot truly be said to have taken place.” *Id.* at 140.

Finally, in *Smith*, in addressing whether the *Pearce* presumption applied to an increased sentence following a trial after a guilty plea had been reversed on appeal, the Court again suggested that a different sentencing authority was a substantial, if not controlling, factor when it stated, “[e]ven when the same judge imposes both sentences, the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial.” *Smith*, 490 U.S. at 801.

Following *McCullough* and *Smith*, a large number of state and lower federal courts held that no presumption arises under *Pearce* where a different judge imposes the second sentence. Most have relied on *McCullough*'s statement that "a sentence increase cannot truly be said to have taken place" where the second judge imposes sentence. *McCullough*, 475 U.S. at 140. *United States v. Cheek*, 3 F.3d 1057, 1064 (7th Cir. 1993); *Rock v. Zimmerman*, 959 F.2d 1237, 1257 (3rd Cir. 1992); *Gauntlett v. Kelley*, 849 F.2d 213, 217 (6th Cir. 1988); *State v. Coleman*, 700 A.2d 14, 24 (Conn. 1997); *State v. Macomber*, 769 P.2d 621, 628 (Ks. 1989); *People v. Mazzie*, 413 N.W.2d 1, 1 (Mich. 1987); *State v. Forsyth*, 761 P.2d 363, 384 (Mont. 1988); *People v. Young*, 723 N.E.2d 58, 62 (N.Y. 1999); *State v. Percy*, 595 A.2d 248, 256 (Vt. 1990); *Graham v. State*, 681 So.2d 1178, 1178 (Fla. App. 2 Dist. 1996); *State v. Neville*, 572 So.2d 1161, 1165 (La. App. 1 Cir. 1990); *Jackson v. State*, 766 S.W.2d 518, 521 (Tex. Crim. App. 1988).

Since Naydihor's second sentence was imposed by Judge Schroeder, not Judge Kluka, no *Pearce* presumption arises. Naydihor must prove actual vindictiveness on the part of Judge Schroeder. There is nothing in the record to establish actual vindictiveness. Thus, Naydihor's current sentence does not violate due process.

B. Considering all the factors, a presumption of judicial vindictiveness is not warranted in this case.

As the *McCullough* Court indicated, in each case a court must "look to the need, under the circumstances, to 'guard against vindictiveness in the resentencing process.'" *McCullough*, 475 U.S. at 138, citing *Chaffin*, 412 U.S. at 25. The circumstances of this case do not require a presumption of judicial vindictiveness.

As previously noted in the prior argument, a different judge resentenced Naydihor after Judge Kluka awarded a resentencing. Even if a different judge does not by itself prevent a presumption of vindictiveness from arising, the fact that a different judge resentenced Naydihor is a factor which bears upon the need for a presumption of vindictiveness. *Mele v. Fitchburg Dist. Court*, 884 F.2d 5, 10 (1st Cir. 1989) (a different judge is a factor to be considered but it is not always determinative).

Second, in this case, Naydihor received a resentencing as a result of a postconviction motion, not after a reversal by an appellate court. The *McCullough* Court noted that a “motion for new trial hardly suggests any vindictiveness on the part of the judge towards [McCullough]. ‘[U]nlike the judge who has been reversed,’ the trial judge here had ‘no motivation to engage in self-vindication.’” *McCullough*, 475 U.S. at 139.

Here, Judge Kluka granted Naydihor’s motion for postconviction relief, which is identical in the procedural posture to McCullough’s motion for a new trial. As in *McCullough*, Judge Kluka “went on record as agreeing that [Naydihor’s] ‘claims’ had merit. Presuming vindictiveness on this basis alone would be tantamount to presuming that a judge will be vindictive towards a defendant merely because he seeks an acquittal.” *McCullough*, 475 U.S. at 139.

It is also noteworthy that, like *McCullough*, Naydihor’s resentencing resulted, not from the trial court’s error, but from the error of the prosecutor. As the *Colten* court observed, it was not “the court with whose work Colten was sufficiently dissatisfied to seek a different result on appeal[.]” *Colten*, 407 U.S. at 116. Nor was it the trial judge “whose handling of the prior [sentencing] was sufficiently unacceptable to have required a [resentencing.]” *Chaffin*, 412 U.S. at 27. Naydihor was dissatisfied with the prosecutor’s argument.

Here, the error which the prosecutor committed was during argument for sentencing, a point at which Judge Kluka had virtually no opportunity to avoid the error which resulted in the need for another sentencing hearing. As in *Chaffin*, it is unlikely that a second judge would be motivated to engage in self vindication. Any judge who might be desirous of avoiding the necessity for a resentencing in similar cases would likely direct any animus toward the prosecutor, not the defendant. After all, judges might reasonably expect prosecutors to avoid end-runs of plea agreements such as occurred before Judge Kluka.

Lastly, although the *Church* decision would seem to apply *Pearce* at least in principle to resentencing, the state believes that the fact that a resentencing is far less of a burden on the trial judge than an entire trial, that factor should, however slightly, weigh in favor of not requiring a presumption in this case.

On balance, the factors in this case do not present the concern for the possibility of retaliatory penalty. This is more along the lines of the *de minimus* possibility as was present in *Chaffin* or *McCullough* than the circumstances of *Pearce* itself. Without a presumption, Naydihor cannot show actual vindictiveness and his claim must fail.

C. Evidence of the greater impact of the crime on the victim overcomes any presumption of vindictiveness.

Even if this court believes a presumption of judicial vindictiveness arises under *Pearce*, Naydihor is not entitled to resentencing because the sentencing judge affirmatively stated his reasons for the increased sentence on the record. Those reasons make clear that the circuit court did not increase Naydihor's sentence out of a sense of vindication.

The purpose of the presumption which the United States Supreme Court imposed in *Pearce* was to ensure that "vindictiveness against a defendant for having successfully attacked his first conviction ... play no part in the sentence he receives after a new trial." *Pearce*, 395 U.S. at 725. To assure the absence of vindictive motivation, the court required that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing." *Pearce*, 395 U.S. at 726.

Naydihor focuses on the court's use of the phrase "conduct on the part of the defendant" to argue that Judge Schroeder's reasons in this case did not provide justification for an increased sentence since it relied, not on his conduct, but on the increased information concerning the victim's condition.

Even at the time of the *Pearce* decision, at least one member of the Court indicated that an increased sentence on retrial could be justified by "any objective, identifiable factual data not known to the trial judge at the time of the original sentencing proceeding." *Pearce*, 395 U.S. at 751 (White, J., concurring in part). The court has since made clear that the *Pearce* language should not be applied mechanically.

Thus, in *Wasman*, the Court indicated: "There is no logical support for a distinction between 'events' and 'conduct' of the defendant occurring after the initial sentencing insofar as the kind of information that may be relied upon to show a nonvindictive motive is concerned." *Wasman*, 468 U.S. at 571-72. The *Wasman* Court accepted a conviction occurring after the first trial as justification for an increased penalty after a second trial.

The purpose of the *Pearce* presumption is to prevent the evil of judicial vindictiveness. *McCullough*, 475 U.S. at 138. In keeping with this purpose, the *McCullough* Court observed that the *Pearce* language “was never intended to describe exclusively all of the possible circumstances in which a sentence increase could be justified. Restricting justifications for a sentence increase to *only* ‘events that occurred subsequent to the original sentencing proceedings’ could in some circumstances lead to absurd results.” *McCullough*, 475 U.S. at 141.

The *McCullough* Court specifically referred to a hypothetical example posited by the solicitor general. In that example, a defendant receiving a short prison term for a non-violent offense is discovered to have been using an alias and, in fact, has a long list of violent convictions. In suggesting that such information, which exists prior to the original trial, but is unknown by the sentencing court, should be available for resentencing after the second trial, the solicitor general argued: “None of the reasons underlying *Pearce* in any way justifies the perverse result that the defendant receive no greater sentence in light of this information than he originally received when he was thought to be a first offender.” *McCullough*, 475 U.S. at 141. The *McCullough* Court agreed, noting that they found “nothing in *Pearce* that would require such a bizarre conclusion.” *McCullough*, 475 U.S. at 142.

The focus of the Court, especially in its later cases, appears to be on factors, which are a relevant and legitimate response to criminal conduct. See *Goodwin*, 457 U.S. at 373 (a presumption “may operate in the absence of any proof of an improper motive [to] block a legitimate response to criminal conduct”). In keeping with this focus, the Court in *Smith* reasoned that the increased sentence was more likely attributed to the evidence after trial as giving a more complete picture of the crime than the evidence after a guilty plea. “[T]he sort of information which satisfies [a guilty plea] will usually be far less than

that brought out in a full trial on the merits.” *Smith*, 490 U.S. at 801. The *Wasman* Court observed: “the requirement that the sentencing authority or prosecutor detail the reasons for an increased sentence or charge enables appellate courts to ensure that a nonvindictive rationale supports the increase.” *Wasman*, 468 U.S. at 572.

The concern for victims of crime has increased dramatically in recent years from the time when *Pearce* was decided in 1969. In 1993, a provision was added to the Wisconsin Constitution ensuring that victims had the right to make a statement to the court at disposition, a right to restitution and to compensation. Wis. Const. Art. I, § 9m. The legislature adopted measures “to ensure that all victims ... rights ... are honored and protected by ... judges in a manner no less vigorous than the protections afforded criminal defendants.” Wis. Stat. § 950.01. The law of this state recognizes the impact of the crime on the victim as a relevant factor in sentencing a defendant. *State v. Spears*, 227 Wis. 2d 495, 507, 596 N.W.2d 375 (1999); *State v. Hall*, 2002 WI App. 108, ¶7, 255 Wis. 2d 662, 648 N.W.2d 41.

The United States Supreme Court is of the view that “to assess meaningfully the defendant’s moral culpability and blameworthiness, [the sentencing authority] should have before it at the sentencing ... evidence of the specific harm caused by the defendant.” *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Thus, under both the Wisconsin law and the United States Constitution, the effect of the crime on the victim is relevant sentencing information.

Relevant sentencing information provides a “wholly logical, nonvindictive reason for the sentence.” *McCullough*, 475 U.S. at 140. And it is apparent that the *Pearce* presumption is not meant to “result in the needless exclusion of relevant sentencing information from the very authority in whom the sentencing power is vested.” *Wasman*, 468 U.S. at 572.

A number of courts have held that reliance on victim information is sufficient to satisfy *Pearce*. Thus, the United States Court of Appeals for the First Circuit opined: “[N]ew information about the extent of the victim’s conscious suffering was available to the district court that would satisfy *Pearce*[.]” *United States v. Sanders*, 197 F.3d 568, 573-74 (1st Cir. 1999).

See also State v. Bruce, 642 N.E.2d 12, 15 (Ohio App. 12 Dist. 1994) (“[T]he record does not show that the trial court imposed a more severe sentence for vindictive or improper reasons; instead, it did so after considering the harm to the victims, a proper statutory factor”); *San Roman v. State*, 842 S.W.2d 801, 804 (Tex. App.-El Paso 1992) (information concerning the life, health, habits, conduct, and mental and moral propensities of the defendant may come from victim impact evidence); *Young*, 723 N.E.2d at 62 (a greater sentence was justified because, by seeking to vacate his plea and proceed to trial, the defendant imposed upon the victim the trauma of testifying); *Ross v. State*, 480 So. 2d 1157, 1161 (Miss. 1985) (record did not support an increased sentence based on the bad physical and mental condition of the victim. However, if the record had shown that the victim’s condition had deteriorated since the first trial, the judge could have possibly justified the harsher sentence).

In this case, Judge Schroeder carefully articulated that he was increasing Naydihor’s sentence because the victim appeared and informed the court of the deterioration of her condition since the first sentencing. Judge Schroeder relied on this information.

And you have ruined this lady’s life. And this case, by the way, is significantly different than what it was when it was before Judge Kluka because Judge Kluka was working off this presentence, which stated that Mrs. Schwamlein suffered extensive injuries to her leg as a result of this accident, etc. Ms. Schwamlein indicated that as a result of the injury suffered to her left leg, she may have

some permanent disability. Well, now we know that she will. And, in fact, she says she'll never walk again. That's a monstrous increase in the enormity of this crime from how it appeared before Judge Kluka. When Judge Kluka heard the case, it says Mrs. Schwamlein believes her medical expenses total at least \$30,000.00. Now she says it's \$75,000.00. And she hasn't seen anywhere near the end of it yet.

(39:25-26.)

The victim information fully comports with all the purposes for the *Pearce* Court requirement that the judge state the reason for the increased sentence on the record. The information was made part of the record. The court specifically referred to it as the reason for the increase in the sentence. The court of appeals and this court can fully review the record to determine that Judge Schroeder's motivation in increasing the sentence was not motivated by vindictiveness for Naydihor's seeking resentencing.

Since the evil, which *Pearce* sought to avoid, was vindictive sentences by the sentencing authority, victim information certainly qualifies as objective information, which indicates a non-vindictive motive. As the *McCullough* Court observed: "[n]othing in the Constitution requires a judge to ignore 'objective information ... justifying the increased sentence.'" *McCullough*, 475 U.S. at 142. Victim information provides a wholly logical non-vindictive reason for an increased sentence. *McCullough*, 475 U.S. at 140. Victim information should serve to overcome any *Pearce* presumption. "A contrary conclusion would result in the needless exclusion of relevant sentencing information from the very authority in whom the sentencing power is vested." *Wasman*, 468 U.S. at 572.

Since Judge Schroeder gave a logical, non-vindictive reason for the increase in the second sentence, any presumption under *Pearce*, if it arose at all, has been overcome. The transcript also shows that Judge Schroeder

was not actually vindictive. Naydihor's current sentence, therefore, does not violate due process.

CONCLUSION

For the reasons stated above, this court should hold that the prosecutor did not breach the plea agreement because all of his statements are fairly characterized as argument for a lengthy period of supervision. Naydihor's sentence does not violate due process because a presumption of judicial vindictiveness never arose since Naydihor was sentenced by a different judge. Even if a presumption did arise, it was overcome by the second judge's reliance on victim information, which was more complete than at the first sentencing. This court should affirm the court of appeals' opinion, which, in turn, affirmed the circuit court's sentence.

Dated at Madison, Wisconsin, this 10th day of November, 2003.

Respectfully submitted,

PEGGY A. LAUTENSCHLAGER
Attorney General

A handwritten signature in black ink, appearing to read "Warren D. Weinstein", with a long horizontal flourish extending to the right.

WARREN D. WEINSTEIN
Assistant Attorney General
State Bar #1013263

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 264-9444

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,622 words.

Dated this 10th day of November, 2003.

A handwritten signature in cursive script, reading "Warren D. Weinstein", written over a horizontal line.

WARREN D. WEINSTEIN
Assistant Attorney General

STATE OF WISCONSIN
SUPREME COURT

CASES 01-3093-CR, 01-3094-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

v.

Trial Case Nos. 00 CF 212
(Kenosha County) 00 CF 471

VICTOR NAYDIHOR,
DEFENDANT-APPELLANT-PETITIONER.

REVIEW OF A DECISION OF THE COURT OF APPEALS,
DISTRICT II, AFFIRMING THE JUDGMENT OF CONVICTION AND
THE ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION
RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR KENOSHA
COUNTY, THE HONORABLE BRUCE E. SCHROEDER PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT-PETITIONER

BY:

Philip J. Brehm
Attorney For Def.-App.-Petitioner
23 West Milwaukee St., Suite 300
Janesville, WI 53548
608/756-4994
Bar. No. 01001823

TABLE OF CONTENTS

	<u>page</u>
ARGUMENT.....	1
I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A RESENTENCING WITHOUT CONDUCTING A <u>MACHNER</u> HEARING.....	1
II. THE TRIAL COURT ERRED IN INCREASING DEFENDANT'S SENTENCE AFTER DEFENDANT BROUGHT A SUCCESSFUL MOTION FOR RESENTENCING BASED ON A PROSECUTOR'S VIOLATION OF THE PLEA AGREEMENT.....	3
A. <u>North Carolina v. Pearce and State v. Church</u> <u>prohibited the trial court from increasing</u> <u>the defendant's sentence at resentencing in</u> <u>the absence of new, objective information</u> <u>concerning identifiable conduct on the part</u> <u>of defendant occurring after the time of the</u> <u>original sentencing proceedings</u>	4
1. Notwithstanding subsequent United States Supreme Court holdings, <u>Pearce</u> remains good law.....	4
2. Given the facts of this case, a presumption of judicial vindictiveness is warranted in this case.....	6
3. Judge Schroeder's statements at resentencing were insufficient to rebut the presumption of judicial vindictiveness in this case.....	9
CONCLUSION.....	12
CERTIFICATION.....	12

CASES CITED

<u>Alabama v. Smith,</u> 490 U.S. 794 (1989).....	4, 6
<u>Chaffin v. Stynchcombe,</u> 412 U.S. 17 (1973).....	4-6
<u>Colton v. Kentucky,</u> 407 U.S. 104 (1972).....	4-6, 8
<u>North Carolina v. Pearce,</u> 395 U.S. 711 (1969).....	passim

<u>State v. Church,</u>	
2003 WI 74,	
257 Wis.2d 442,	
650 N.W.2d 873.....	4, 11
<u>State v. Machner,</u>	
92 Wis.2d 797,	
285 N.W.2d 905 (Ct.App. 1979).....	3
<u>State v. Smith,</u>	
207 Wis.2d 259,	
558 N.W.2d 379 (1997).....	3
<u>State v. Stubbendick,</u>	
110 Wis.2d 693,	
329 N.W.2d 399 (1983).....	6
<u>State v. Williams,</u>	
2002 WI 1,	
249 Wis.2d 492,	
637 N.W.2d 733.....	1
<u>Texas v. McCollough,</u>	
475 U.S. 134 (1986).....	4-6, 10
<u>U.S. v. Floyd,</u>	
519 F.2d 1031 (5th Cir. 1975).....	6, 8
<u>U.S. v. Whitley,</u>	
734 F.2d 994 (4th Cir. 1984).....	6
<u>Wasman v. United States,</u>	
468 U.S. 559 (1984).....	9-10

STATE OF WISCONSIN
SUPREME COURT

CASES 01-3093-CR, 01-3094-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,
v.

Trial Case Nos. 00 CF 212
(Kenosha County) 00 CF 471

VICTOR NAYDIHOR,
DEFENDANT-APPELLANT-PETITIONER.

REVIEW OF DECISION OF THE COURT OF APPEALS,
DISTRICT II, AFFIRMING THE JUDGMENT OF CONVICTION AND
THE ORDER DENYING DEFENDANT'S MOTION FOR POSTCONVICTION
RELIEF, BOTH ENTERED IN THE CIRCUIT COURT FOR KENOSHA
COUNTY, THE HONORABLE BRUCE E. SCHROEDER PRESIDING

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION
FOR A RESENTENCING WITHOUT CONDUCTING A MACHNER
HEARING.

State v. Williams, 2002 WI 1, 249 Wis.2d 492, 637 N.W.2d
733 provides guidance for resolving this issue. In reaching
its decision, the court discussed the duties of a prosecutor
when discussing a plea agreement:

While a prosecutor need not enthusiastically
recommend a plea agreement, the court of appeals
has stated that he or she "may not render a less
than a neutral recitation of the terms of the plea
agreement." "End runs" around a plea agreement are
prohibited. "The State may not accomplish by
indirect means what it promised not to do directly,
and it may not covertly convey to the trial court
that a more severe sentence is warranted than
recommended. Id at ¶42.

The State must balance its duty to convey relevant
information to the sentencing court against its duty
to honor the plea agreement. Thus as the court of
appeals has written, the State must walk a "fine
line" at a sentencing hearing. A prosecutor may
convey information to the sentencing court that is
both favorable and unfavorable to the accused, so
long as the State abides by the plea agreement.
That line is fine indeed. Id. at ¶44.

We must examine the entire sentencing proceedings to evaluate the prosecutor's remarks. Upon reviewing the State's comments in the context of the sentencing hearing, we conclude, as a matter of law, that the State stepped over the fine line between relaying information to the circuit court on the one hand and undercutting the plea agreement on the other hand. The State substantially and materially breached the plea agreement because it undercut the essence of the plea agreement. Id. at ¶46.

The State breached the plea agreement at resentencing in this case. The prosecutor's argument to the court suggested nothing short of a prison sentence was appropriate. In arguing that probation was an appropriate sentence structure, the State had a duty to argue facts in support of probation. It is a fact the prosecutor failed to present a plausible argument probation was viable or appropriate. The prosecutor did not say one positive word about the defendant during his remarks at resentencing. At resentencing, the prosecutor highlighted the victim's substantial injuries and concluded its argument by suggesting that all the money in the world would not give the victim the ability to walk again (R.39:16). This powerful assertion was an embellishment of the truth. The reality is at no point did the victim claim she would in fact never walk again. In fact, she implicitly told the court her doctors were optimistic she would walk again (R.39:10). In making this argument, the State conveyed to the trial court that the victim's injuries had worsened since the time of original sentencing and invited the trial court to impose a harsher sentence than the prior judge. Defendant asserts this

argument was an end run around the plea agreement. As such, the State violated the plea agreement.

Trial counsel did not object to the State's improper argument at resentencing. If, as a matter of law, the State breached its agreement with the defendant, trial counsel's failure to object would be deficient performance unless there was some strategic reason for trial counsel's failure to object to the State's improper argument. See State v. Smith, 207 Wis.2d 259, 558 N.W.2d 379, 386 (1997). Although it is difficult to imagine a circumstance when trial counsel would ever have a strategic reason for not objecting to a legally inappropriate argument by the State, case law requires a Machner hearing in this situation. See State v. Machner, 92 Wis.2d 797, 285 N.W.2d 905 (Ct.App. 1979).

II. THE TRIAL COURT ERRED IN INCREASING DEFENDANT'S SENTENCE AFTER DEFENDANT BROUGHT A SUCCESSFUL MOTION FOR RESENTENCING BASED ON A PROSECUTOR'S VIOLATION OF THE PLEA AGREEMENT.

Defendant was entitled to a fair sentencing hearing before Judge Kluka. Through the actions of the State, he was denied that right. As he had a right to do, defendant moved for a resentencing. The State now argues he should have to bear the weight of the substantially harsher sentence pronounced at resentencing by Judge Schroeder even though there was no new negative conduct regarding defendant produced at resentencing. The result sought by the State defies logic and existing case law.

A. North Carolina v. Pearce and State v. Church prohibited the trial court from increasing the defendant's sentence at resentencing in the absence of new, objective information concerning identifiable conduct on the part of defendant occurring after the time of the original sentencing proceedings.

1. Notwithstanding subsequent United States Supreme Court holdings, Pearce remains good law.

North Carolina v. Pearce, 395 U.S. 711 (1969) prohibits the end result in this case. The State argues the Pearce presumption of vindictiveness has been modified by subsequent United States Supreme Court cases and it should not apply to this case for a number of reasons. First, the State argues the relevant holding of Pearce should not apply because a different judge imposed sentence at resentencing. In support of this position, the State discusses the United States Supreme Court holdings in Colton v. Kentucky, 407 U.S. 104 (1972), Chaffin v. Stynchcombe, 412 U.S. 17 (1973), Texas v. McCollough, 475 U.S. 134 (1986) and Alabama v. Smith, 490 U.S. 794 (1989). In each of these cases, the court upheld harsher sentences imposed at resentencing. However, none of these cases explicitly holds the presumption of vindictiveness would not apply to the fact pattern in the case before the court.

In Colton, a Kentucky case, defendant was resentenced by a superior court after defendant exercised his right to a trial de novo from an inferior court decision, a procedure not existing in Wisconsin. The right to a trial de novo in the superior court was absolute, regardless of whether the

inferior court had committed error. Id. at 113. The trial de novo represented a completely fresh determination of guilt or innocence. Id. at 117. In all likelihood, the trial de novo court was not even informed of the sentence imposed in the inferior court. Id. at 118. The defendant necessarily ran the risk, if convicted in the superior court, of receiving a greater punishment than imposed by the inferior court. Id. at 106. The circumstances minimized the risk of vindictiveness.

In Chaffin, the harsher sentence on resentencing was imposed by a jury, whose members were unaware of the first sentence imposed. Under this circumstance, there would be no reasonable likelihood of vindictiveness. The sentencing jury could not have had a retaliatory motive.

In McCollough, the first sentencer, a jury, imposed a sentence of 20 years. Due to prosecutorial misconduct, the trial court granted defendant a new trial. On retrial, the trial court was the sentencer and imposed a 50 year prison sentence. The harsher sentence was in part the result of trial court's knowledge of facts not before the sentencing jury, including evidence tending to show defendant had personally committed the murder in question. Id. at 136. The Supreme Court determined the circumstances of the case made the Pearce presumption inapplicable. The defendant made a conscious choice to have the presiding judge, rather than a jury, sentence him. Id. at 139. As the trial judge had granted the defendant a new trial, there was no reasonable

likelihood of subsequent vindictiveness. Id.

In Smith, defendant was sentenced more harshly after withdrawing his guilty plea and being found guilty after trial. Inevitably, a trial court will learn much more about a defendant and their crime after sitting through a jury trial. See eg. State v. Stubbendick, 110 Wis.2d 693, 329 N.W.2d 399, 404-05 (1983). The Supreme Court held the trial court's harsher sentence after trial did not run afoul of the Pearce presumption.

In addition to these four United States Supreme Court cases, the State cites several cases where lower courts have opined the Pearce rule does not apply where a different judge imposes sentence at resentencing (State's brief at 19). However, at least two lower courts have found to the contrary. See U.S. v. Floyd, 519 F.2d 1031 (5th Cir. 1975) and U.S. v. Whitley, 734 F.2d 994 (4th Cir. 1984).

2. Given the facts of this case, a presumption of judicial vindictiveness is warranted in this case.

In each of the above four United State Supreme court cases, the circumstances of each case made the risk of vindictiveness at resentencing extremely low. However, in this case, the risk of vindictiveness was more than de minimus, as argued by the State (State's brief at 21). The Pearce presumption should apply to this case.

Unlike the procedure in Chaffin and Colton, the procedure utilized by the resentencing judge in this case necessarily

allowed him to discover what sentence had been imposed previously. Armed with this information, Judge Schroeder could have impermissibly used Judge Kluka's previous sentence as a baseline sentence, to be enhanced upward only, if he perceived a deterioration of the victim's health between sentencing and resentencing. There is reason to believe this in fact occurred. In resentencing the defendant, Judge Schroeder stated:

And you have ruined this lady's life. And this case, by the way is significantly different than what it was when it was before Judge Kluka because Judge Kluka was working off this presentence, which stated that [the victim] suffered extensive injuries to her leg as a result of this accident, etc.. [The victim] indicated that as a result of the injuries suffered to her left leg, she may have some permanent disability. Well, now we know that she will. And, in fact, she says she'll never walk again. That's a monstrous increase in the enormity of this crime from how it appeared before Judge Kluka. When Judge Kluka heard this case, it says [the victim] believes her medical expenses total least \$30,000. Now she says it's \$75,000. And she hasn't seen anywhere near the end of it yet (R1-39:25-26, App. 136-37).

If he had not used Judge Kluka's sentence as a baseline, minimum sentence, why would Judge Schroeder have bothered saying this case was significantly different than it was when before Judge Kluka and why would he have talked about a "monstrous increase in the enormity of the crime" from the time when Judge Kluka heard the case?

The State argues that since Judge Kluka granted relief based not on her error, but on the error of the prosecution, that the risk of vindictiveness at resentencing was low

(State's brief at 20). However, it is important to note Judge Schroeder did not grant defendant resentencing in this case; Judge Kluka did. After reviewing the file, Judge Schroeder could have been inclined to conclude the error leading to resentencing was hypertechnical and ultimately irrelevant to the imposition of an appropriate sentence. After all, Judge Kluka had a right and duty to consider the information about the additional drunk driving convictions not known to the prosecutor at the time the plea bargain was struck, but which came to light in the presentence report, regardless of whether this information was inappropriately argued at sentencing by the State. Under these circumstances, Judge Schroeder could have concluded there was no error to fix. Interestingly, Judge Schroeder downplayed the general importance of a prosecutor's sentencing recommendation at sentencing, increasing the likelihood Judge Schroeder felt there was no error to correct (R1-47:24-25).

Unlike in Colton, both sentencing judges in this case were equals, circuit court judges in Kenosha County. In United States v. Floyd, 519 F.2d 1031 (5th Cir. 1975), the court, in supporting the Pearce rule, noted that defendants could be deterred from exercising their right to seek review because of a reasonable apprehension that judges who work together daily and who must preside at each other's retrials will have a stake in discouraging such review. This concern is relevant to the risk of vindictiveness.

3. Judge Schroeder's statements at resentencing were insufficient to rebut the presumption of judicial vindictiveness in this case.

As Pearce makes clear, the reason for an increase in sentence at resentencing must be based on new, objective information concerning identifiable conduct on the part of defendant occurring after the time of the original sentencing proceedings. Although the effect of a crime on a victim is certainly a relevant consideration at sentencing, there has never been a United State Supreme Court case, a Wisconsin Supreme Court case, or Wisconsin Court of Appeals case since Pearce which has upheld a trial court's increase of a defendant's sentence at resentencing based solely on a trial court's perception that the impact of the offense on the victim appeared worse at resentencing than it did at original sentencing. As previously argued by the defense, this "new" information was not new at all and had been fully considered by Judge Kluka at the time of the original sentencing. As this was the only significant new information quoted by the resentencing judge in justification of the harsher sentence, it is insufficient to overcome the Pearce presumption of vindictiveness.

The State argues the holding in Wasman v. United States, 468 U.S. 559 (1984) is broad enough to legitimize the trial court's actions in this case. While the Wasman court relaxed what constitutes "identifiable conduct on the part of defendant" occurring between sentencing and resentencing, its

focus still remained on the conduct of the defendant. In Wasman, the new information was a criminal conviction occurring between the time of sentencing and resentencing. The Wasman court reinforced the concept that an increase in a sentence had to be premised on a negative event or negative conduct involving the defendant other than the crime for which the defendant was before the court.

Even though the conviction in Wasman was not itself new conduct, the defendant at least had the ability to weigh how this new development could affect resentencing in deciding whether to appeal. The same would be true in analyzing the hybrid example discussed in McCollough, cited by the State (State's brief at 23). In the example, a defendant sentenced as a first time offender is granted a resentencing. In the interim, it is determined he has a long history of violent offenses under an alias. Under a strict reading of Pearce, his sentence could not be enhanced at resentencing. However, under Wasman, he clearly could receive a longer sentence. Again, a defendant in this situation would have the ability to consider the possibility of this information becoming known to the judge at resentencing. Unlike the defendant in Wasman and the hybrid example, the defendant in this case had no real ability to weigh the possibility of the health of the victim changing for better or worse in deciding whether to appeal. A victim's health, which could literally ebb and flow on a daily or weekly basis, cannot be accurately assessed by a

person in defendant situation who is trying to decide whether to appeal. This uncertainty, completely beyond the control of a defendant, would have a chilling effect on a defendant's appeal rights. At least part of the reason Pearce holds what it holds is to protect defendants who behave themselves during the appeal process, something within the control and knowledge of a defendant.

Understandably, the State does not spend much time discussing State v. Church, 2003 WI 74, 257 Wis.2d 442, 650 N.W.2d 873. Defendant asserts the issue related to whether the victim's alleged deterioration in health is sufficient to justify a harsher sentencing in the face of the Pearce presumption is easily resolved by using the framework of Church. In deciding the issue, the Wisconsin Supreme Court said:

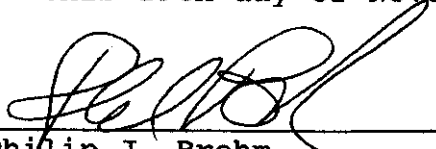
The Pearce presumption of vindictiveness can be overcome if "affirmative reasons" justifying the longer sentence appear in the record and if those reasons are "based on upon objective information" regarding events or "identifiable conduct on the part of the defendant" subsequent to the original sentencing proceeding. Pearce, 395 U.S. at 726.

If one applies Church to the facts of this case, it is apparent defendant Naydihor's increased sentence cannot be upheld. The set of facts relied upon by the trial court at resentencing to increase defendant's sentence was neither new, "objective information," nor was it "identifiable conduct on the part of the defendant" occurring subsequent to the original sentencing.

CONCLUSION

For the reasons set forth above, this court should grant defendant a resentencing. In the alternative, this court should vacate the sentence imposed by Judge Schroeder at resentencing. Judge Kluka's sentence structure should be reinstated.

Respectfully submitted this 29th day of November, 2003.

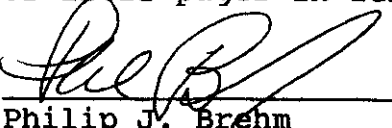

Philip J. Brehm
Attorney For Def.-App.-Pet.

23 West Milwaukee St., Suite 300
Janesville, WI 53548
608/756-4994
Bar. No. 1001823

CERTIFICATION

I certify this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: Courier 12, 10 spaces per inch, non-proportional font, double spaced, 1 1/2 inch margins on the left and one inch margins on the other three sides. This brief is 12 pages in length.

Dated: 11/29/03


Philip J. Brehm